

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
REPLY BRIEF**

74-1306

ORIGINAL

In The
United States Court of Appeals
For The Second Circuit

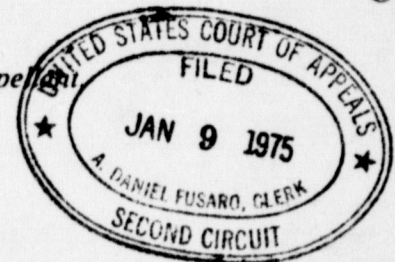
AH LOU KOA,

Plaintiff-Appellant

vs.

AMERICAN EXPORT ISBRANDTSEN LINES, INC.,

Defendant-Appellee.



**REPLY BRIEF FOR
PLAINTIFF-APPELLANT**

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In The
UNITED STATES COURT OF APPEALS
For the Second Circuit

Docket No. 74-1306

AH LOU KOA

Plaintiff-Appellant,

vs.

AMERICAN EXPORT ISBRANDTSEN LINES INC.,

Defendant-Respondent.

REPLY BRIEF FOR PLAINTIFF-APPELLANT

POINT I

CERTAIN ERRORS IN APPELLEES BRIEF
IN ALLUDING TO THE APPENDIX REQUIRE
CORRECTION OR AMPLIFICATION FOR THE
ASSISTANCE OF THIS COURT

A

On page 9 of Appellees brief it is urged that Appellant acquiesced or consented to the dismissal of the negligence count by the trial court when it quoted plaintiff's counsel as having said "I will leave it to Your Honor then (99a)"*

This remark is taken out of context of what had transpired in regard to the dismissal of the negligence phase which act of the trial court plaintiff had been vigorously opposing.

*References to pages with "a" following, refers to Joint Appendix.

Just prior to the above quotation the Court said (in addressing plaintiff's counsel in regard to the negligence count) at 97(a) "Unless you withdraw it I am going to grant the motion because I don't find the evidence for the Jury to go on." Page 98(a) is concerned almost entirely with argument by plaintiff's counsel opposing the dismissal of the negligence allegation.

It thus becomes clear that plaintiff's counsel refused to withdraw the count as the Court requested he do by stating to the Court, "I will leave it to Your Honor then." In the foregoing frame of reference, it is obvious that counsel's remark at (99a) indicated futility at further discussion at this point rather than acquiescence.

B

At page 24 et seq. of Appellees brief in discussing the question of Appellants complaint of unfair comment on the evidence by the trial Court, it states that plaintiff's counsel was unfair to the witness Anduiza. It further states that plaintiff's counsel in summation charged that Anduiza was out to protect the appellee when he obtained appellants statement (exhibit B) and that this charge was unsupported by the evidence (Appellees brief p. 26). Thus the Court had the right to make the comments regarding Anduiza to rectify plaintiff's "unsupported" charge, the Appellee argues.

Both appellee in its argument and the Court in its comment were the ones who are unsupported.

Plaintiff's counsel was entirely supported by the evidence on this point.

In crossexamination of Anduiza he admitted that in taking the statement from the plaintiff his purpose was to protect the defendant against claims.

At (109a-110a),

Q. Wasn't one of the purposes of going to see Mr. Koa to protect the company against possible future claims?

A. We consider that true.

Q. You consider that true?

A. Yes.

Further on the question of the fairness of Anduiza at 102(a),

Q. Did Mr. Koa have any difficulty with the English language?

A. Yes.

At (103a),

Q. After he read it did you ask him whether it was true or not?

A. I didn't even finish until after he finished reading. I didn't finish until he read it because I was not sure whether he could read the statement or not.

At (118a),

Q. Weren't you interested at the time in talking to the man whether he was in pain from any injury?

A. No sir. That is not my job.

Q. You knew his name came from the medical log didn't you?

A. Yes sir.

At (123a),

Q. All you know is you had difficulty and they had difficulty with a lot of the words, isn't that right?

A. They had difficulty reading my statement sir.

Finally, from a fair inference based upon the foregoing, the illiteracy of the plaintiff and the fact that Anduiza at the time was an investigator for the defendants attorneys, and not for the defendant itself, plaintiff's attorney was within proper bounds when he argued that Anduiza was protecting the defendant.

It is noteworthy that after the Court's comments on the evidence in its charge which comments have been set forth, it did not warn the Jury that it was not bound by the Court's views. Even after exception by plaintiff's counsel the Court did not issue such a warning.

II

THE DISMISSAL OF THE NEGLIGENCE COUNT WAS
NOT HARMLESS ERROR

A

Appellee argues that even though the Trial Court dismissed the negligence count, nevertheless it was charged to the Jury and thus appellant was the beneficiary of the Court's ruling.

This argument is belied by the record.

Appellees motion to dismiss was made upon the basis of no knowledge of defendant (97a).

The Trial Court then stated that any evidence of knowledge of defendant was pure speculation, (97a). All of the foregoing, in spite of the evidence that plaintiff's superiors permitted him to work for a period of time while they were present; at least long enough to prepare a certain amount of food for members of the crew (203a-204a, 17a).

It is respectfully urged that this was at least a question of fact for the Jury. Not only on knowledge of water on the deck but on the question as to whether plaintiff's superiors knowingly permitted him to work under unsafe conditions, namely the rough weather, regardless of the condition of the deck.

Under the evidence it is conceivable that the jury could (and they did) find the vessel seaworthy but that the defendant was negligent in that, his superiors knowingly permitted him to work there and then despite the seaworthiness of the vessel under unsafe conditions (the rough weather).

The evidence herein points out a clear example of one of the differences between the concepts of unseaworthiness and negligence.

It should be noted additionally that in his opening, plaintiff's counsel made the following statement.

(10a) "We claim it was wet at that point. I am going to ask you to find if we prove, that even if it was dry, to have him work in that rough weather was unsafe and negligence."

No where does it appear that this theory was abandoned. Argument on any phase of the negligence count at the conclusion of the plaintiff's case was futile in view of the fact that immediately upon defendants motion it was evident that the Court had made its decision without entertaining argument when it said (97a --"Unless you withdraw it I am going to grant the motion because I don't find the evidence for the Jury to go on." After this, all attempts at discussion on this subject obviously were futile.

Additionally on the question of negligence, the Court charged the Jury, that it was out of the case.

At(237a),"When I was selecting you as jurors, I talked about the negligence aspect at that time. That has been disposed of, and the fact that it has been disposed of is not to the detriment or benefit of either side here."

At(238a) "However in this area here, the unseaworthiness, this does not depend upon any negligence or fault on the part of the shipowner because it doesn't make any difference whether he was negligent or not."

At(241a) "Of course, we are not concerned with negligence ----

Thus, the entire thrust of the Court's charge as to working conditions, lack of safety, and knowledge of the defendant, was in the framework of unseaworthiness, to wit: the condition of the vessel and precluded the jury from deciding the case on acts or omissions involving negligence.

III

APPELLEES AUTHORITIES ON THE QUESTION
OF THE NECESSITY OF CHARGING BOTH
NEGLIGENCE AND UNSEAWORTHINESS IN A
SEAMANS CASE

Appellee urges that it is unnecessary to charge unseaworthiness and negligence in a seamans case where they are both based upon the same condition.

This argument, of course, cannot be deemed applicable in all cases. Each stands on its own facts. Thus the following authorities are not controlling here.

On page 17, of its brief, Appellee cites Rice v. Atlantic Gulf & Western Co., 484 F.2d 1318, as a proposition of dismissing for lack of notice to defendant.

First, the trial court there submitted the case on either unseaworthiness or negligence. In addition on the facts in Rice, there was utter absence of proof of knowledge by the defendant of the oily condition of the steps. In our case appellants superiors had been present before and during the accident.

On page 19 of its brief, Appellee cites Spano v. Koninklijke Rotterdamsche Lloyd, 472 F.2d 33. However, in that case the Court did charge both.

On page 20, appellee cites Poller v. Thorden Lines A/B, 336 F.Supp. 1231, for the proposition that the negligence and unseaworthiness were based on the same condition, and thus a charge on both is unnecessary.

Appellant respectfully urges that the aforesaid decision was based on specific facts and is erroneous as a general holding on the law.

A subsequent decision, Lunsford v. Halcyon Steamship Company, Inc. 354 F.Supp. 573, emanating from the same Court as Poller, is a correct one on this subject. The Court held in Lunsford that the concepts of seaworthiness and negligence are separate, that the difference is the difference between absolute duty and due diligence.

At page 576, the Court said:

"The findings of negligence but no unseaworthiness are not hopelessly inconsistent. The jury could have found that, in general, the ship was reasonably fit without a ladder leading from an upper bunk, but under the circumstances of the ship heading into rough seas, which were known to be rough by the Master, that there arose a duty to furnish a ladder, and that the failure to furnish a ladder was a failure to exercise due care under the circumstances. Therefore, the findings of the jury are reconcilable."

See also Mitchell v. Trawler Racer, 362 U.S. 539.

Respectfully submitted,

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Of Counsel

Herbert Zelenko

UNITED STATES COURT OF APPEALS

AH LOU KOA,

Plaintiff-Appellant,
against

AMERICAN EXPORT INC.,
Defendant-Appellee

Index No.

Affidavit of Personal Service

STATE OF NEW YORK, COUNTY OF NEW YORK

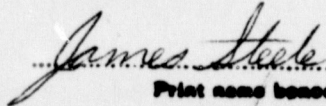
ss.:

I, James Steele, being duly sworn,
deposes and says that deponent is not a party to the action, is over 18 years of age and resides at
250 West 146th Street, New York, New York
That on the 9th day of January 1974 at 1 State Street Plaza

deponent served the annexed Reply Brief for Plaintiff-Appellant upon

Haight, Gardner, Poor & Havens
the in this action by delivering ² true copy thereof to said individual
personally. Deponent knew the person so served to be the person mentioned and described in said
papers as the Attorney(s) herein,

Sworn to before me, this 9th
day of January 1974


Print name beneath signature

JAMES STEELE



ROBERT T. BRIN
NOTARY PUBLIC, STATE OF NEW YORK
NO. 31 - 0418050
QUALIFIED IN NEW YORK COUNTY
COMMISSION EXPIRES MARCH 30, 1975



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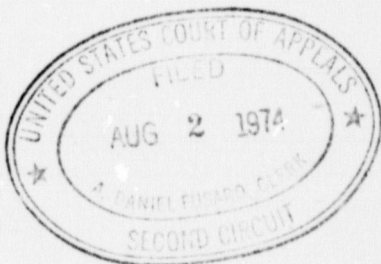
vs.

AMERICAN EXPORT ISBRANDTSEN LINES, INC.,

Defendant-Appellee.

*On Appeal from a Judgment of the United States District
Court for the Southern District of New York.*

JOINT APPENDIX



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RELEVANT DOCKET ENTRIES

AH LOU KOA vs. AMERICAN EXPORT ISBRANDTSEN LINES, INC.

71 Civil 3606 (JMC)

August 12, 1971	Filed Complaint. Issued Summons.
August 26, 1971	Filed Summons with Marshal's ret. Served: Am. Export Isbrandtsen Lines, Inc. by Mr. McCastis on 8-17-71.
January 3, 1972	Filed ANSWER to complaint.
January 3, 1972	Filed Notice of Examination Before Trial.
August 16, 1972	Filed Interrogatories by the Defendant.
November 22, 1972	Filed Defendant's Memorandum of Law in support of this motion.
December 7, 1972	Filed MEMO. END. on motion papers filed 11/22/72. Motion withdrawn. So Ordered. Cannella, J.
December 12, 1972	Filed Plaintiff's interrogatories. Pro- pounded to defendant.
February 16, 1973	Filed Plaintiff's Answers to Defendant's Interrogatories.
February 28, 1973	Filed Stipulation and Order extending deft. time to object interrogatories by plaintiff to March 24, 1973. CANNELLA, J.
May 15, 1973	Filed defendant's Answer to interrogs. of plaintiff.
June 7, 1973	Filed plttf's further answers to certain of deft's interrogs.
July 10, 1973	Filed pre-trial order Cannella, J.
February 4, 1974	Before Cannella, J. - Jury trial begun.
February 5, 1974	Trial cont'd.
February 6, 1974	Trial cont'd.
February 7, 1974	Trial cont'd and concluded. Jury ver- dict for deft. Judgment to be entered.
February 8, 1974	Filed Judgment - ordered that deft. Amer. Exp. Isbrandtsen Lines, have judgment against the plaintiff, Ah Lou Koa, dismissing the complaint. Clerk (m/n)

RELEVANT DOCKET ENTRIES

February 8, 1974	Filed deft's preliminary requests to charge.
February 8 , 1974	Filed deft's supplemental requests to charge.
February 8, 1974	Filed pltff's requests for charge.
February 8, 1974	Filed pltff's additional request to charge.
February 8, 1974	Filed pltff's addition request.
February 8, 1974	(Rec'd in Court-130-74) Filed memorandum of law on behalf of pltff.
March 1, 1974	Filed pltff's notice of appeal from judgment entered against him on 2-8-74. Copy mailed to Haight, Gardner, Poor & Havens. Entered 3-1-74.
April 5, 1974	Filed stip and order extending the time to transmit record on appeal to USCA to 5-29-74. So ordered - CANNELLA, J.
May 21, 1974	Filed notice that the record on appeal has been certified and transmitted to the USCA on 5-21-74.

EXHIBIT B - STATEMENT OF AH LOU KOA TAKEN ABOARD THE CHAMPION
ON MARCH 15, 1971

My name is Ah Lou Koa
I am a messman aboard
the Champion.

I live at 77 Arroyo St. Mex
~~On~~ On January 18 - 1971, I
was walking in the messroom
when the ship took a
sudden roll and I fell
down hitting my right
knee and left ankle on the
deck.

The chief cook saw me
fall.

The deck was dry and
clean. I fell because
the ship took a very heavy
roll. We had rough
weather for several days.
I dropped a salad bowl
that I was carrying.

I did not suffer any
other accident.

I have seen the above
and it is true.

I read it to my brother.

3/15/71

ming Lou Koa Ah Lou Koa

Statement of Ah Lou Koa taken by planning
Aboard the Champion on 3/15/71 page 43

Exhibit B - Statement of Ah Lou Koa Taken Aboard the Champion
on March 15, 1971

My name is Ah Lou Koa
I am a messman aboard
the Champion.

I live at 77 Essex St. N.Y.
On January 18 - 1971, I
was walking in the messroom
when the ship took a
sudden roll and I fell
down hitting my right
knee and left ankle on the
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I did not suffer any
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I have seen the above
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I read it to my brothers.

3/15/71

King Lou Koa Ah Lou Koa

Statement of Ah Lou Koa taken by glennings
Aboard the Champion on 3/15/71 page 43

EXCERPTS FROM PLAINTIFF'S OPENING

7a

els
* * *

8

1
2 serving table, a water fountain, and a pantry. And then
3 in the middle of the room are tables lengthwise, a couple
4 of them, lengthwise, let's say, from the jury box like
5 these tables are out, a couple of them this way and some
6 this way, where the men would come in and sit. And they
7 had seats which were affixed to the deck so they couldn't
8 move around.

9 That generally was the picture of this mess room
10 where this accident took place. On this day at this time
11 Mr. Koa, as I said, got a hold of this salad bowl, and the
12 weather was -- it was quite rough, but he had to do his job.
13 So he got the salad bowl and the only way he could do the
14 job was to brace himself against this serving table, the
15 little serving table I told you which was near that galley
16 opening, and hold the bowl with one hand the best he
17 could, and dish out the salad with the other.

18 On the table or on the serving table they either
19 had a mat or wet towel to keep dishes from rolling off or
20 scattering off in case of rough weather.

21 But where he had to plant his feet there was
22 nothing at all but the smooth tile deck, and he was
23 provided with nothing in the way of a handhold or a belt,
24 or any other kind of device which he could hold on to while
25 he was doing this work.

1 els

2 Besides that, at that time the deck wasn't
3 dry. When I say deck, the floor of the mess room.
4 There was water on it. It was a little difficult to see
5 the water because sometimes the water was the same color
6 as the tile. There wasn't supposed to be any water
7 there. It was supposed to be dry. But at that time
8 we claim there was water there. We claim, and you will
9 have to infer from the way we describe this thing, that
10 this water on the deck came from that drinking fountain.

11 The mess room was mopped once a day, in the
12 morning. We claim that it was the duty of the other
13 messman to mop it. The company claims it was the duty
14 of Mr. Koa to mop it.

15 In any event, you only mop once a day, in the
16 morning. But during the day, for lunch and/or for dinner
17 and other times during the day the seamen would come in
18 and they'd traipse in from the outside, no matter how it
19 was on the outside, and if the weather, the ship was rolling
20 a little or something, they all went for water and took a
21 drink, the water would splash out of the drinking fountain,
22 either because of the weather being rough or because the
23 water didn't go down fast enough, or because maybe it was
24 being loaded in pitchers.

25 But water would come out of that drinking

1 els

2 fountain. And what happened on this particular day
3 was this:

4 As Koa was working, the ship took an extra big
5 roll. You must remember, we will prove that he was
6 experienced at his job. He had been doing it for a number
7 of years, so he knew how to protect himself the best he
8 could. But this particular time there was an extra roll
9 and water came right across the floor under his legs,
10 causing his legs to go out from under him, and he banged
11 his knees down on the deck, dropped the salad bowl out of
12 his hands and slid all the way across from the serving
13 table to the pantry at the other end. Slid right across.

14 He will tell you, his pants were wet and that
15 water had sloshed in right under him. At this point this
16 is what we claim is the unseaworthiness and the negligence
17 of the company.

18 One is, there wasn't supposed to be water there.
19 And secondly, whichever his Honor charges you and you can
20 figure either on negligence, he wasn't given a safe place
21 to work or safe methods or reasonably safe conditions under
22 which he should do his work. We claim that for him to
23 have to do his job in this weather the way he did it, were
24 reasonably unsafe method and a reasonably unsafe place
25 to work without any protection for himself, either a strap,

1 els

2 a belt, a handhold, a mat.

3 We claim that this is what the ship did wrong,
4 the company did wrong. Either unseaworthiness or
5 negligence or both. And that is whether the floor was
6 dry or wet.

7 We claim it was wet at that point. I am going
8 to ask you to find if we prove, that even if it was dry,
9 to have him work in that rough weather was unsafe and
10 negligence.

11 The steward was in the room at that time.
12 There were a couple of people in the room. I'm not going
13 to go into what the other side says they will be able to
14 prove, but I hope we will be able to prove this part of the
15 case as we go along.

16 On the testimony, the main witness and practic-
17 ally I would say the only witness for the plaintiff is
18 Mr. Koa, outside of perhaps some depositions taken by
19 the defendant which may or may not corroborate him.

20 I am going to ask you to observe him; observe
21 his demeanor, to try to determine whether you feel he is
22 telling the truth. But you are not going to get his
23 testimony directly. He has great difficulty in talking
24 English. Although he is a citizen, he has great diffi-
25 culty. Some words he understands, some he doesn't.

1 els

2 But in order to prepare this case, it's been necessary for
3 us to use an interpreter.

4 We have an interpreter here who speaks the
5 dialect that he does. She has been the interpreter in
6 the depositions that were taken before, but she will, of
7 course, have to be qualified by his Honor. But in any
8 event, it will be through the interpreter I think mostly or
9 almost entirely that you will get his version of what
10 happened.

11 As I say, I am going to ask you to wait until
12 all the evidence is in before you make up your minds, which
13 is the right and proper way to do it.

14 If you find that any of the testimony is not
15 exactly as I told you we will prove it, you have to be
16 governed by the testimony from the stand. Also, as I did
17 tell you, I believe, there will be some pictures here
18 which will assist you in determining just what happened,
19 where it happened, and how it happened.

20 Thank you very much.

21 THE COURT: Mr. Carr.

22 MR. CARR: Your Honor, Mr. Zelenko, ladies and
23 gentlemen of the jury:

24 We feel this is basically a very simple case.
25 Very simple case. The issues are uncomplicated, and
★ ★ ★

EXCERPTS FROM TRANSCRIPT RELATING TO INTERPRETERS FOR
els PLAINTIFF

12a

22

1 ***

2 the qualifications of Mrs. Hung, in view of the fact that
3 her connection with this case has been other than simply
4 as an official court interpreter.

5 THE COURT: The Court has no objection.

6 What do you propose to do about an interpreter?

7 MR. CARR: I have an interpreter, your Honor.

8 THE COURT: You have?

9 MR. CARR: Yes. I have Mrs. Lin, who I under-
10 stand has been used by this Court in the past, although I
11 have never had any previous contact with Mrs. Lin.

12 MR. ZELENSKO: May I say this, your Honor.
13 Mr. Carr had no objection at the deposition.

14 THE COURT: I know, but we are not talking about
15 deposition. We are talking about trial. And it might
16 be better if we have the other young lady. She can remain
17 here and assist you, and if there is any question at all,
18 we can see if there is any.

19 MR. ZELENSKO: I would like to find out if the
20 other woman is qualified.

21 THE COURT: Yes. You can sit down now and
22 remain with Mr. Zelenko.

23 Will you please give your name?

24 MRS. LIN: Caroline Lin.

25

1 els

Lin

2 VOIR DIRE EXAMINATION

3 BY THE COURT:

4 Q Have you had an opportunity to talk to Mr. Koa?

5 A No.

6 Q Come over here and talk to him and ask him his
7 name, where he lives, and where he comes from and some
8 questions like that.

9 (Pause.)

10 Q What dialect do you speak?

11 A He now speaks in Shanghainese.

12 Q Do you understand him?

13 A Yes.

14 Q Do you feel he is responsive to the questions
15 you put to him?

16 A Yes, it's all right.

17 THE COURT: Mr. Koa, if at any time you want to
18 consult with your own interpreter here, just make it known
19 to the Court and you can do that.

20 Don't you say anything, Miss Interpreter.

21 Mr. Koa, how long have you been in the United
22 States?

23 THE INTERPRETER: You want him to understand
24 English or do you want me to interpret?

25 THE COURT: I want you to say what he said.

1 els

Lin

2 THE INTERPRETER: He say he came here 1951.

3 THE COURT: You had to study English in order to
4 become a citizen, didn't you?

5 THE INTERPRETER: Some he understand, but not
6 all.

7 THE COURT: Do you understand a little bit?
8 Do you know what a sailor is?

9 (Question interpreted.)

10 THE COURT: Did they ask you who was the President
11 of the United States, when you got your citizenship papers?

12 (Question interpreted.)

13 A Some I understand, I answer, but just a little
14 bit.

15 BY THE COURT

16 OF THE PLAINTIFF MR. KOA:

17 Q How long ago was it when you got your citizenship
18 papers?

19 A 1964.

20 THE COURT: When he answers in English, you
21 don't have to interpret. He said 1964.

22 Q Who was the President in 1964?

23 A Mr. Kennedy.

24 Q What happened to Mr. Kennedy, he was killed?

25 A Yes.

1	els	Lin
---	-----	-----

25

2 Q You understand a little bit of English, but
3 you feel better in your own language?

4 A Yes.

5 THE COURT: We are going to speak in your own
6 language, so we will go on with that.

7 Do you want to ask her anything?

8 MR. ZELENKO: I just want to get other qualifica-
9 tions.

10 Q Have you been an interpreter before?

11 A Yes, I work with the Federal Court since last
12 year. I work with Mrs. Rowan in the Criminal Court last
13 week. I have another appearance in the court too.

14 Q Mrs. Rowan is an Assistant United States
15 Attorney and she was presenting a case?

16 A Yes.

17 Q What business do you have, if any?

18 A Now I work for the New York State Employment
19 Agency.

20 Q That is your job ordinarily?

21 A Before. But I am not working any more since
22 1972.

23 Q And you gave your name to the United States
24 Attorney and whenever they want an interpreter, they call
25 you?

5 1 els

2 AH LOU KOA

3 vs.

71 Civ. 3606

4 AMERICAN EXPORT ISBRANDTSEN
5 LINES.

6 -----

7 New York, February 5, 1974;
8 2.00 o'clock p. m.

9 (Trial resumed.)

10 - -

11 (In the courtroom - in the presence of
12 the jury.)

13 MR. CARR: Your Honor, may I make a request to
14 see how well we can do without the interpreter?

15 THE COURT: Why not. I tried it yesterday.
16 I didn't see to get very far, but if that is the case, why
17 not.

18 MR. CARR: The deposition was conducted for the
19 most part without an interpreter.

20 THE COURT: All right. If you cannot under-
21 stand it, we will use the interpreter.

22 MR. ZELENKO: The deposition we started and
23 Mr. Carr had his interpreter. But as we went along we
24 had to use Mrs. Hung. I will try it.

25 THE COURT: No, he wants you to ask him in

1 els

2 English. We are not even talking about Chinese yet.

3 MR. ZELENKO: I understand that.

4 THE COURT: We will try it. After all, he's
5 been here since '53, as he puts it. That is 21 years.

6 You use expressions that are Anglo-Saxon rather
7 than Latin in origin, that might be better. You don't
8 mind in the beginning if counsel leads until he gets to a
9 crucial point.

10 MR. CARR: No, sir.

11 THE COURT: All right. You have the right to
12 lead.

13 MR. CARR: Mrs. Lin, we are going to try to do
14 it in English.

15 THE INTERPRETER: I told him, whenever he under-
16 stands he answers in English. Otherwise I will interpret
17 to him.

18 MR. ZELENKO: May I ask you also, Mrs. Lin and
19 Mr. Koa, talk loud. You talk loud, Mr. Koa, and Mrs. Lin,
20 you talk loud so everybody can hear. I am going to ask
21 you questions in English. If you understand, you
22 answer. If you cannot, you tell Mrs. Lin.

23 * * *

24 - - -

els

A H L O U K O A , the plaintiff, called as a
witness in his own behalf, being first duly sworn,
testified as follows:

DIRECT EXAMINATION

BY MR. ZELENKO:

Q Mr. Koa, how old are you?

A 56 now.

Q Are you a citizen?

A Yes.

Q Do you know when you became a citizen, what
year?

A 1964.

Q What kind of work have you been doing from,
let's say 1961 up to 1961 up to the time of your accident?
What kind of work?

A A cooker.

THE COURT: You are not taking advantage of the
leeway. Mr. Carr said, you could have said to him, have
you been a cook.

Q Have you worked in the steward's department on
ships?

A Yes.

Q About what year did you start to work on ships?

A 1967.

1 els

Koa-direct

32

2 Q Or did you work on ships before that?

3 A No, in American in '67.

4 Q You worked American ships since 1967?

5 A Yes.

6 Q But you worked on other ships before that?

7 A Just China.

8 Q Chinese ships?

9 A Yes.

10 Q Did you go to school in China?

11 A Two years, a couple of years.

12 Q About two years?

13 A Yes, a couple of years.

14 Q You started to work on American ships in 1967
15 in the steward's department?

16 A Yes.

17 Q Were you a cook or were you -- did you just help
18 the cooks out, like they call a messman?

19 A American ship no cook, galleyman they call it.

20 Q You were a galleyman?

21 A Yes, galleyman.

22 Q What do you do as a galleyman? What kind of
23 work do you do?

24 A Wash pots, fresh vegetables --

25 Q Excuse me. Slow.

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1  ||      els      Koa-direct
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2 A Fix everything, vegetables.

3 Q What else?

4	A	Wash pots.
---	---	------------

5 Q That was the kind of work you do?

6 A Yes.

7 Q That is what you were doing on the ships; is
8 that right?

9 A Right.

10 Q In December of 1970 you signed on as a galleyman
11 on the Export Champion; is that right?

12 A No, that is another ship. In 1967 another
13 ship.

14 Q No, 1970.

15 MR. CARR: Your Honor, Mrs. Lin --

16 THE COURT: He does not want you to do that.
17 He wants to see how much this man can do on his own.
18 When the Court tells you to assist him, then you assist
19 him.

20 MR. CARR: I think the witness clearly under-
21 stood that question.

22 THE COURT: We'll find out.

23 Read the question to him again. I don't think
24 he heard it. He referred it back to '67, rather than
25 '70.

1 els

Koa-direct

34

2 MR. ZELENKO: I will talk louder.

3 MR. CARR: Can we have the question read back,
4 your Honor. I think it was '67 in the question.

5 MR. ZELENKO: I will reframe the question.

6 THE COURT: You withdraw it?

7 MR. ZELENKO: Yes.

8 Q In December of 1970 you signed on as a galleyman
9 on the Export Champion; is that right?

10 A No galleyman, no Export Champion.

11 Q What did you sign on?

12 A Crew pantry.

13 Q Crew pantryman?

14 A Yes.

15 Q On the Export Champion?

16 A Yes.

17 Q In December 1970?

18 A 1970.

19 Q When you were on that ship in 1970 the ship
20 went to the Pacific Ocean; is that right?

21 MRS. HUNG: She didn't translate that right.

22 THE COURT: Wait a minute. This is not a
23 two meeting, please. You know, the reporter has to write
24 that down, and you chattering back and forth in some
25 oriental tongue -- please, what's going on here.

1 els

Koa-direct

2 THE INTERPRETER: I answer her.

3 THE COURT: Just keep your mouth shut. All you
4 do is say what he says and don't argue. He said yes, he
5 sailed on the Pacific.

6 Do you say he said something different --

7 MRS. HUNG: No, I --

8 THE COURT: That's it. Go on with the next
9 question.

10 Q On January 18, 1971 you had an accident, is that
11 right?

12 A Yes.

13 Q About what time of the day did the accident
14 happen?

15 A January 18.

16 Q What time of day on January 18?

17 A 4.30.

18 Q Was the sea rough or was it calm that day?

19 THE COURT: I think there is practically a
20 stipulation that there was heavy weather and that the sea
21 was rough, is that right?

22 MR. CARR: I will so stipulate.

23 MR. ZELENKO: I have to ask him, though.

24 THE COURT: No, you don't have to ask him.
25 You know, you used a half hour to tell this jury about this

1 els Koa-direct

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2 case when it could have been said in five minutes. So I
3 don't want to keep regurgitating a lot of things that are
4 not in issue here to this jury. They couldn't care less.

5 We have in the record now that it was a rough
6 sea. That is stipulated between the parties.

7 Now go on.

8 Q I show you a picture. Will you please mark
9 this for identification.

10 THE COURT: Why don't you show it to counsel
11 and find out whether he will stipulate, instead of going
12 through that rigamarole.

13 MR. ZELENKO: They stipulate to these pictures.

14 THE COURT: Then put them in evidence. Why go
15 through the rigamarole with him, when they will be marked
16 in evidence?

17 Mark them Plaintiff's Exhibits 1, 2 and 3 in
18 evidence.

19 (Plaintiff's Exhibits 1, 2 and 3 were received
20 in evidence.)

xx 21 THE COURT: Before you go into the photographs
22 with him, show them to the jury so they know what you are
23 talking about when he goes over them.

24 MR. ZELENKO: May I give them to the jury,
25 your Honor?

1 els

Koa-direct

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2 THE COURT: Yes. That is what I am suggesting.

3 (Pause.)

4 THE COURT: These are photographs which the
5 parties have agreed are fair and accurate representations
6 of the location depicted of the condition on January 18,
7 1971.

8 MR. ZELENKO: It is a representation of the room,
9 your Honor, but the pictures were not taken on that day.

10 THE COURT: I didn't say that. I say they
11 were substantially, the general background, and so forth is
12 substantially the same as it was on the 18th, although I
13 didn't say they were taken on the 13th.

14 (Pause.)

15 THE COURT: Since they are in evidence, Mr.
16 Zelenko, remember what you told them on the opening where
17 the wall and the galley was and all that? Why don't you
18 take the photograph and show the jury what you are talking
19 about.

20 MR. ZELENKO: I will do that. I'd like to
21 point this out, ladies and gentlemen.

22 THE COURT: Which exhibit are you looking at?

23 MR. ZELENKO: I'm looking at Plaintiff's Exhibit
24 2. This white wall that you see is the wall that I describ-
25 ed opposite you. Here on the left is the opening from

1 els

Koa-direct

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2 MR. ZELENKO: But it's a doorway. This is
3 the galley, the opening from the galley where the dishes
4 are passed through.

5 Q Mr. Koa, at the time of the accident what were
6 you doing?

7 A The salad, salad dishes, fixing the salad.

8 Q Tell us what you were doing.

9 THE COURT: He said he was fixing the salad.

10 A The second cook tell me to pick up the salad
11 bowl, I filling some more dishes, you know, 25, 30 people.

12 THE COURT: The reporter has that, so he will
13 read it to the jury.

14 (Record read.)

15 MR. ZELENKO: I think he also described he was
16 holding up a salad bowl.

17 THE COURT: That is what he was doing with his
18 hand.

19 Q What were you doing with his hands? Were you
20 holding anything in your hand at the time of the accident?

21 A One hand take the bowl, one hand take the spoon.

22 Q What were you holding in your hand?

23 A Only like this.

24 THE COURT: He is doing it mostly by motions and
25 he is indicating he was holding the bowl with his right hand

1 els

Koa-direct

2 in a curved motion with his right hand and arm, and in his
3 left hand he was holding the spoon with the spoon and the
4 bowl.

5 Q About how big was the bowl?

6 A Like this.

7 MR. ZELENKO: Indicating about 18 inches in
8 diameter.

9 MR. CARR: I will agree.

10 Q How were you standing?

11 A Like this, by a little table.

12 THE COURT: He stood up and indicated he was
13 standing with his right side, right portion of his body
14 towards the table.

15 Q Were you leaning right up against the table?

16 A Yes, against, you know. Leaning on the table,
17 besides the table.

18 Q Then what happened?

19 A Then the ship roll, too much water flow.

20 Q Then what happened after the water flow, what
21 happened to you?

22 A Much come water. Because the water flows in,
23 I fell by this water.

24 Q What made you fall, do you know?

25 THE INTERPRETER: The water, he said.

1 els

 Koa-direct

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2 Q Did you fall down on the deck?

3 A Yes, fall down, pants got wet, you know.

4 Because the water flow in, I fell by the water flow in.

5 So the two feet land down on the floor.

6 THE COURT: The two feet or the two knees?

7 THE INTERPRETER: Knees. The --

8 MRS. HUNG: Also the blood on his knees'

9 THE INTERPRETER: No, he didn't say blood.

10 THE COURT: Wait a minute. You know, even in
11 English if you listen to a person think, you may think
12 that the person should say "is not" or "isn't", or should
13 say it is of a color hue or of a colored appearance.
14 Don't be picking up nitpicking things. The lawyer is
15 indicating to you he only wants you to tell him when you
16 feel there is something very radically different from what
17 he is translating. Not little nitpicking things.

18 Do you understand that?

19 MRS. HUNG: Well, I usually translate from the
20 exact words, but I will adhere to what you say, Judge.
21 I'm sorry.

22 THE COURT: You tell the lawyer when there is
23 something you want to bring to his attention. And if he
24 thinks it is sufficiently important he will bring it to
25 my attention. All right.

1 els

Koa-direct

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2 Q When you fell down after you hit the deck, what
3 happened to you?

4 THE INTERPRETER: When he fell down, and then
5 he fell backwards, because he fell, his knee was bleeding.

6 MR. ZELENKO: What happened to him after he hit
7 the deck?

8 THE COURT: We have to give you and the inter-
9 preter the same advice. We have to talk as if she is
10 not there. You don't have to say "He said." If he
11 says "No," say "No." You don't have to say "He said no,"

12 THE INTERPRETER: In the other court we have
13 to do it that way.

14 THE COURT: I don't care what you did in the
15 other court. I am telling you what you have to do here.
16 If he says "Yes," say "Yes." You don't have to say
17 "He says yes." You are just like an echo; do you under-
18 stand that?

19 THE INTERPRETER: Yes.

20 THE COURT: All right.

21 Q After you fell dosn by the table, what happened
22 to your body? Where did you end up? By the table or
23 did you end up some place up in the room?

24 A After I fell down, at the back, and then the two
25 knees bleeding, a lot of blood.

1 els

Koa-direct

2 Q No, I didn't ask you that.

3 THE COURT: Don't argue with him. It's bad
4 enough we have two interpreters and a judge.

5 Q After you fell down --

6 THE COURT: Wait a minute, Mr. Zelenko. You see,
7 Mr. Carr is giving you some leeway and until he tells you
8 not to, then you stop. But after you fell in the water
9 and your knees went down, did you then slide over to where
10 the pantry room was?

11 MR. CARR: Could the record reflect that your
12 question in English to Mr. Koa has been answered in a
13 lengthy form in Chinese by Mr. Koa, without the aid of the
14 interpreter.

15 THE COURT: That's right. That is what happened.
16 He apparently understood my question. But also I want to
17 indicate in the record that my question was a yes or no
18 answer, so that I'm going to strike whatever he said to
19 the interpreter out because it would be subject to that
20 objection. Just answer yes or no.

21 When you fell down on your knees did you then
22 slide over to where the pantry door was?

23 THE WITNESS: Pantry door hit my head too.

24 THE COURT: Never mind whether it hit your head.
25 can't you answer yes or no?

1 els

Koa-direct

2 After you fell down did you slide along the
3 floor over to where the pantry door was?

4 THE WITNESS: Yes.

5 THE COURT: All right.

6 Q While you were working at the table did you have
7 anything to hold on to? While you were working holding
8 the bowl in your right hand and dishing out the salad was
9 there anything that you could hold on to because of the
10 rough sea? Anything that you could hold on to keep you
11 from falling? Just answer yes or no.

12 THE COURT: No, that is a long question.

13 MR. ZELENKO: I will withdraw the question.

14 THE COURT: I'm sure he doesn't understand it.
15 It should be through the interpreter. Part of this I think
16 you can reach by stipulation with Mr. Carr. There were no
17 holding handles or rails or anything of that kind on this
18 table, were there?

19 MR. CARR: No, that --

20 THE COURT: That's all he is trying to develop
21 at this point.

22 MR. CARR: There are no handholds on the table
23 as far as I know, your Honor.

24 THE COURT: And no hand grabs of any kind,
25 metal things that he could hold on to?

els Koa-direct

MR. CARR: Well, there is nothing there designed specifically for a handheld.

THE COURT: That's all I want.

Q Were there any mats under your feet? Any mat or anything to keep you from slipping under your feet?

A Nothing.

Q When was the floor of the mess room mopped?

A Every morning after breakfast.

Q Was it mopped any other time during the day?

THE COURT: I will sustain an objection to that unless you establish the basis for his answer. He would have to practically be there all the time to know that and you haven't established that.

Q Did you work in the morning mess too for the morning breakfast? Was it part of your job to work on the morning meal too?

A I worked through but the cleaning is another person.

THE COURT: Did you tell it to him carefully?

In the morning breakfast, did you work in that room?

THE WITNESS: I am washing, taking in the dirty dishes.

Q Did you also work at lunchtime?

A Same thing.

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Koa-direct

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Q Do you know when the mess room was mopped?

A The messman wash every morning.

Q When, in what part of the day?

A Every day one time.

Q What time?

A After breakfast.

Q Was it your job to mop the mess room?

A I wash the pantry.

Q You wash the pantry?

A Yes.

MR. CARR: Objection as not responsive.

THE COURT: Strike that out.

Q Whose job was it to mop the mess room?

A Messman.

Q Not you?

A No.

Q During the day did any of the crew come in to
use the water fountain?

A Yes, everybody come and drink, pull out water.

Q Did they use it for drinking and also for filling
pitchers of water?

A Yes.

MR. CARR: Your Honor, we are getting into some
leading areas now that I would like --

1 els Koa-direct

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2 THE COURT: All right. He doesn't want you to
3 lead him any more.

4 MR. ZELENKO: All right.

5 Q Did you ever see any of the men, any of the crew,
6 use the water fountain?

7 A Yes, for drinking water all the time.

8 Q They were drinking water all the time. Did you
9 ever see any water splash out of the drinking fountain?

10 A Yes, all the time go water out.

11 Q Where would it go?

12 A The water come out on the floor.

13 MR. CARR: Your Honor, my objection is to the
14 form of the question, unless we have a time specified or a
15 date.

16 THE COURT: Thus far it's been general.
17 I haven't heard it specified down to the time in question
18 or the day in question.

19 Q When you worked in that room on the day of the
20 accident, when you worked in the morning and you worked
21 at lunch did you see the men go to the drinking fountain
22 to get water?

23 A Yes, drink water, some time water go out.

24 Q Did you see the water go on to the floor, let's
25 say around lunchtime?

1 els

Koa-direct

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2 MR. CARR: I object.

3 THE COURT: Sustained.

4 A Yes. Ship roll, more water go out. Ship no
5 roll, no matter. This time the ship roll, bad weather.

6 THE COURT: You don't have to translate that
7 because the objection has been sustained.

8 Mr. Zelenko will put another question.

7 9 Q When the men were drinking water around lunch-
10 time did you see any of the water flow on to the floor
11 from the drinking fountain?

12 A Yes, flow out too.

13 Q Whose job was it to fill the water pitchers
14 around lunchtime?

15 A The messman.

16 Q That wasn't you?

17 A No.

18 Q Did you see any water come out of the pitchers
19 on to the floor around lunchtime when they were filling the
20 pitchers?

21 MR. CARR: Objection.

22 THE COURT: Sustained as to form.

23 A Yes, sometimes water go out too.

24 Q I have to ask you another way:

25 When they filled the water pitchers around lunch-

1 els Koa-direct

49

2 time --

3 MR. CARR: Objection.

4 Q Did you see any water pitchers being filled
5 around lunchtime?

6 THE COURT: That is two questions. We will
7 take the second one.

8 Q Did you see any water pitchers being filled
9 around lunchtime on the day of the accident?

10 A Yes, they go out too.

11 Q Did you see what happened to the water that was
12 put into the pitchers?

13 A No, another fellow --

14 THE COURT: Your Honor, he said some time in the
15 icebox.

16 THE WITNESS: Some time I go to another place.

17 THE COURT: All right. Sometimes he is in
18 another place.

19 Q When you were there the day of the accident
20 just before the accident when you were working, was the
21 other messman in the room too?

22 A Yes, he working at another job.

23 Q But was he in the messroom when you had your
24 accident?

25 A Yes, in the room too.

1 els

Koa-direct

2 Q When you had your accident was he in the
3 messroom?

4 A Yes.

5 Q Who else was in the messroom when you had your
6 accident?

7 A Somebody sit down, the chief cook and the
8 steward.

9 Q Do you know where they were when you had your
10 accident? What part of the messroom were they in?

11 A They sit at a table, talk, had a cup of coffee.

12 Q Do you know what happened to the bowl of salad
13 that you were working on when you fell down?

14 A One hand kept, the ship roll --

15 Q No, what happened to the bowl after you fell?

16 A Fell away. Everything fell away.

17 Q Did it fall to the deck?

18 A Yes, everything fall away. Dishes, every-
19 thing. No more table.

20 Q On the table itself, on the salad table, was
21 there anything to keep the dishes from going off?

22 A Yes.

23 Q What was it?

24 A Dishes all over the floor.

25 Q The dishes fell on the floor too?

1 els

Koa-direct

2 A Yes.

3 Q Before they fell on the floor, was there any-
4 thing on the top of the salad table under the dishes?

5 A No. You got a wet towel first.

6 Q I show you Exhibit 2 and ask you, will you
7 please mark with a K, your initial, where you were standing
8 when the accident happened?

9 THE COURT: You mark the K. Let him point
10 it out with his finger.

11 (Pause.)

12 MR. ZELENKO: He pointed out he was standing
13 here. I will put the K.

14 (Pause.)

15 Q Point out the drinking fountain?

16 A Yes. This water.

17 MR. ZELENKO: Mr. Carr, he's pointed out the
18 fountain. May I put a F there for "fountain".

19 (Pause.)

20 Q Will you point out where the opening from the
21 galley is?

22 A He brings salad for me this window. Maybe this
23 window.

24 MR. ZELENKO: Mr. Carr, he has pointed out the
25 window. I will put a S there, where he got the salad

1 els Koa-direct

2 bowl from the galley window.

3 (Pause.)

4 MR. CARR: You are designating the window
5 with a S?

6 MR. ZELENKO: Yes.

7 May I just give this to the jury at this point?

8 THE COURT: Oh, I don't think so. They'd
9 have to be so dense they wouldn't know enough to go home.
10 They have seen that picture. They know what you are
11 talking about.

12 Q I show you Exhibit 3 and I ask you to point out
13 to me the pantry.

14 Where is the pantry that you slid into?

15 A Here's the water.

16 Q No, where is the pantry? .

17 A The pantry is this way.

18 MR. ZELENKO: I will put a P there. The door
19 of the pantry.

20 (Pause.)

21 Q While you were working just before the accident,
22 did anybody tell you to stop working?

23 A No, nobody told.

24 Q Was the salad that you were working on, was that
25 for the evening meal? * * *

1 els

Koa-cross

56

2 ***
 else.

3 MR. ZELENKO: This is a court case, which is
4 something entirely different than working on a ship.

5 THE COURT: I realize that, and you are both
6 going to tell the jury that. But you have covered that
7 point now, and I suggest you get on to another one.

8 MR. CARR: May I ask this, your Honor:

9 Q When you went down to get your papers, your
10 citizenship papers --

11 A Yes, I got.

12 Q You got citizenship papers in 1964?

13 A Yes.

14 Q Did they ask you if you could read and write
15 English?

16 A No, I can't read. Just asking me something,
17 talking, you know.

18 Q Did they ask you if you could read and write
19 simple English?

20 A I can't read. Just asking. No. They asked,
21 but I told them I couldn't write and not read too much.

22 Q You told them you couldn't write and you couldn't
23 read too much?

24 A I can't read. Just I can't read.

25 Q Can you read any English?

1 els

Koa-cross

2 A No, just name, my address, my home.

3 Q You can read a little English?

4 A My name and home address.

5 Q Could you read the menus on the ship?

6 A No. I can't read the menu. I ask somebody.

7 Q Was it ever your job to go get food in the ice-
8 box?

9 A Yes.. I asked somebody.

10 Q Who did you ask?

11 A Another third cook, everybody, another messman,
12 you know.

13 MR. CARR: Your Honor, can the Court take
14 judicial notice of Section 312 of the Immigration and
15 Nationality Act --

16 THE COURT: I can take judicial notice of any
17 law. He got his papers and now here is a fellow who
18 cannot read. So what about it? The fact is, this is
19 not a proceeding to take his papers away. This is a
20 proceeding where he claims he had an accident. So I will
21 take judicial notice. So what about it?

22 I swear in these fellows by the barrels and I
23 have done it since I have been here 11 years, and I believe
24 that as soon as they get the papers, very shortly after
25 that, unless they go to school or some place else where

1 els

 Koa-cross

2 they are exposed to English, they are just as dense as
3 when they started in, as far as the language is concerned.

4 That is not going to prove anything except the
5 fact that he got his papers and maybe he should or should
6 not have gotten them.

7 What about it?

8 MR. CARR: I just wanted the Court to take
9 judicial notice of this particular section.

10 THE COURT: That he is supposed to know how to
11 read and write simple English?

12 MR. CARR: Exactly.

13 THE COURT: What about it?

14 MR. CARR: That's all.

15 THE COURT: I take judicial notice of it. But
16 I also tell the jury that as far as I am concerned, what
17 they have to find in this case is what happened here, not
18 something about the citizenship papers.

19 MR. CARR: I understand that, sir. But may I
20 simply state the provision as it is contained here?

21 THE COURT: Wait a minute. I could call a
22 provision here which you couldn't answer; do you know
23 that? There are certain portions of history and the
24 Constitution you are supposed to know, and I tell you now
25 that if they asked me that question I couldn't answer.

1 els

Koa-cross

2 MR. CARR: I would probably have the same
3 trouble.

4 THE COURT: Then why belabor that point?
5 The point is, he doesn't understand English too well.
6 So what about it?

7 Q Mr. Koa, did you know the chief cook on the
8 Export Champion?

9 A I don't know his name.

10 Q Did you know the chief cook?

11 A Yes, but I don't know his name.

12 Q Did you ever go ashore with the chief cook?

13 A Yes, one time I go ashore.

14 Q Where?

15 A I forgot. Japan.

16 Q Pusan?

17 A I forgot. One time yes, one time we go ashore.

18 Q You and the chief cook went ashore together?

19 A We went both the same boat, you know. Ship
20 anchor.

21 THE COURT: He said yes, but he doesn't remember
22 where. You suggested Pusan.

23 MR. CARR: I don't know if he said that or not,
24 your Honor.

25 THE COURT: Was it in Pusan?

1 els

Koa-cross

2 THE WITNESS: Yes, maybe Pusan. Same boat.

3 The ship was anchored. Same boat, shore boat.

4 Q This was after your accident, right?

5 A (No response.)

6 Q After your accident you went to Pusan?

7 A Yes, something.

8 Q Did you go ashore with the chief cook, Mr. Eeley?

9 A I don't know name. I forgot.

10 Q You went ashore with the chief cook?

11 MR. ZELENKO: If your Honor please, I think we
12 went over this. I don't see the relevancy.

13 THE COURT: I don't know, it may be connected.
14 I want to make sure he understands the question and under-
15 stands what he said. Up to this point he said he did go
16 ashore with the chief cook, and it was in Pusan. And it
17 was after the accident. That is as I understand it.

18 MR. ZELENKO: He said On a shore boat.

19 THE WITNESS: Two much time go ashore, in
20 Yokahama.

21 Q I am not talking about Yokohama. Pusan.

22 A Yes, maybe one time. The ship was anchored.
23 Too much people.

24 THE COURT: Did you go ashore with him?

25 THE WITNESS: Yes.

1 els Koa-cross

2 THE COURT: All right.

3 Q After you got off the shore boat did you and
4 the chief cook --

5 A The ship was anchored, you know.

6 Q Yes. After you got ashore did you and the
7 chief cook go out together?

8 MR. ZELENKO: If your Honor please, I object
9 to the question, did you go out together. In this frame-
10 work, I say it is an ambiguous question. Let him make it
11 more definite.

12 THE COURT: He does have a language difficulty.
13 I suggest maybe the form should be, "Did you go anywhere
14 with him, and if you did, where did you go?"

15 Q Did you go anywhere with the chief cook?

16 A The ship was anchored, too many people go ashore.
17 Too many people same boat, you know.

18 Q You and the chief cook, did you go anywhere
19 together in Pusan?

20 A I say go ashore maybe one time in same boat, you
21 know.

22 THE COURT: Did you go to a restaurant or a bar
23 or a hotel?

24 THE WITNESS: No. Maybe drink one beer, you
25 know.

1 els

Koa-cross

2 Q You had a drink of beer with him?

3 A Maybe one beer, I don't know.

4 MR. ZELENKO: He didn't say with him. He said
5 maybe one beer.

6 Q I am talking about the chief cook; did you have
7 a beer with the chief cook in a restaurant?

8 A No beer. Some time he pay, maybe I pay.
9 I forgot.

10 Q One of you paid for the beer?

11 MR. ZELENKO: If your Honor please, I object to
12 this. I don't think it is relevant.

13 THE COURT: I don't know whether it is relevant.
14 Suppose he told this fellow that the accident didn't happen
15 at all?

16 MR. ZELENKO: I think it will develop that that
17 is not the case.

18 THE COURT: You are clairvoyant; I am not.
19 I cannot do that. I don't have that ability. I must
20 take it subject to connection, and if it is not connected,
21 then I will instruct the jury to forget all about this.

22 MR. ZELENKO: One more thing, your Honor.

23 I would ask counsel about where he went after
24 the accident, the number of places, we are not concerned
25 with that at this time. Not that I want to hide anything,

1 els

Koa-cross

2 but we are not trying that portion of the case now.

3 He did go ashore for certain reasons.

4 THE COURT: He went to the hospital or wherever
5 he went. What about it? he wants to go to a bar or
6 restaurant and have a drink with the chief cook, that is a
7 simple question.

8 You can develop that he went to four hospitals,
9 that's all right.

10 The point of the matter is, he is entitled to
11 examine him in this area.

12 Did you go to a bar or a restaurant with the
13 chief cook and have a beer with him, at the time?

14 THE WITNESS: Yes, maybe one time.

15 THE COURT: One time, at Pusan?

16 THE WITNESS: Yes. I forgot. He go before
17 in Korea.

18 Q Mr. Koa, what was your rating on the ship?

19 A What?

20 Q What was your rating on the ship? What was
21 your job?

22 A My job, me?

23 Q Yes.

24 A Crew pantryman.

25 Q Wasn't your job a messman?

1 els

Koa-cross

2 A Crew pantryman.

3 Q Do you have your discharge with you?

4 A No. Me a crew pantryman.

5 Q Do you have your discharge with you?

6 THE COURT: Do you have your Coast Guard papers,
7 the seaman's papers?

8 THE WITNESS: Yes, I got them.

9 THE COURT: That is what he wants to see.
10 Show it to him.

11 MR. ZELENKO: If your Honor please, we will
12 concede that he was listed as a messman on the crew. We
13 will concede that the discharge shows that he was rated as
14 a messman. That is the way the rating was.

15 THE COURT: All right.

16 Q Mr. Koa, you just heard Mr. Zelenko say that
17 you were carried as a messman?

18 A No, crew pantry. I all the time take crew
19 pantry.

20 Q Where do you get that from?

21 A What do you mean, from?

22 Q Is it on your discharge that you were pantryman?

23 MR. ZELENKO: If your Honor please, we will con-
24 cede it is not on the discharge.

25 THE COURT: But he still insists that he is a

1 els

Koa-cross

2 pantryman, even now. I don't know what the answer is.

3 He may be misinformed, so I don't know.

4 A I told you all the time, crew pantryman.

5 THE COURT: But the ship carries you as a mess-
6 man.

7 THE WITNESS: Another man, crew messman. Only
8 two.

9 Q Two crew messmen?

10 A One crew messman. I am crew pantryman.
11 Officers too, same thing.

12 THE COURT: The only thing is, it is very clear
13 that he considers himself as a crew pantryman, but the
14 record is very clear also, because Mr. Zelenko has conceded,
15 that he was in fact a messman. He is confused, that's
16 all.

17 Q What is the messman's job?

18 A He washes tables. I wash pantry or wash
19 dishes.

20 Q Did you ever serve tables?

21 A Sometimes a cup of water, in the back, dishes I
22 wash.

23 Q Sometimes he'd go back and wash dishes?

24 A No.

25 Q Did you ever serve the tables?

1 els Koa-cross

2 A He serves tables.

3 Q Did you ever serve tables?

4 A No. He work tables. Sometimes I put --

5 Q Sometimes you put the water?

6 A No. You got two men.

7 THE COURT: Nobody is trying to put anything
8 over on anybody, I'm sure. I thought he said butter at
9 the time.

10 Q Did you put butter on the table?

11 A No.

12 THE COURT: But you put the salad on the table?

13 THE WITNESS: That is for me. Everything take
14 by themselves. Somebody that want, they take. Just
15 prepare on the table.

16 Q Mr. Koa, while you were standing there at the
17 salad counter, putting the salad in the dishes, did you see
18 any water on the deck?

19 A No, before I no see. It come when the ship
20 roll, somebody drink.

21 Q When you were standing there you didn't see any
22 water on the deck?

23 A Not before.

24 MR. ZELENKO: I submit, your Honor, it's a
25 confusing question. Here he is, standing at the table

1 els

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2 and he is asked whether he saw water on the deck. I submit
3 that is a confusing question. I object to it.

4 THE COURT: He said no in answer to that question.
5 I overrule the objection.

6 Q You claim there was water on the deck?

7 A I fall down, water come too much.

8 Q When is the first time you saw water on the deck
9 that afternoon?

10 A No, before comes in all the time, somebody drink
11 water.

12 Q When did you start working in the messroom that
13 afternoon, what time?

14 A What time start?

15 Q Yes, what time did you start?

16 A 3.30.

17 Q 3.30?

18 A Yes.

19 Q What did you start doing in the messroom at
20 3.30?

21 A You say what happened 3.30?

22 Q At 3.30 what kind of work did you start doing?

23 A Well, pantry, somebody is all the time coffee,
24 milk, I wash dishes, two sinks. One with soap water,
25 carry everything. I make two pots of coffee, with the

4 MR. ZELENKO: I ask your Honor to ask the witness
5 whether he is talking of that day or what his usual job
6 was.

12 Q Did you do any work in the messroom at 3.30?

14 Q No, did you do any work in the messroom?

16 Q You were working in the pantry at 3.30?

18 Q When did you walk into the messroom? What
19 time?

21 Q Yes.

24 THE COURT: No, wait a minute. You came there
25 to work at 3.30.

1 els

 Koa-cross

2 THE WITNESS: Yes.

3 THE COURT: What time did you walk into the
4 messroom? When did you go in the messroom?

5 THE WITNESS: Same place, pantry and messroom
6 same place. Only one door to walk in.

7 THE COURT: So you went there at 3.30?

8 THE WITNESS: Yes.

9 Q You say the pantry is inside the messroom?

10 A Yes.

11 Q Right. What door did you go in the messroom
12 when you reported at 3.30?

13 A 3.30 I have to sit down and work get a cup of
14 coffee, just I wash dishes.

15 THE COURT: What door did you go in?

16 Q When you went into the messroom at 3.30 what
17 door did you go in?

18 A I can't see on this one.

19 THE COURT: Which did you show him?

20 MR. CARR: I showed him Exhibit 1.

21 THE COURT: On Exhibit 1 he says he cannot see
22 the door that he went in.

23 Q Can you see the door in Exhibit 2?

24 A I come over here door.

25 Q That is the door I just showed you. This one

1	els	Koa-cross
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2 || here?

3 A Yes. Look like it.

4 Q Exhibit 1, that is the door you came in?

5 A Yes. I come in, come over here.

6 THE COURT: Indicating.

7 MR. CARR: Indicating the door on the left-
8 hand side of Exhibit 1.

9 Q You didn't come in that door in Exhibit --

10 A Some time I come too.

11 Q No, this afternoon, the afternoon of your
12 accident you came in this door, is that right?

13 A No. This I forgot. I got two doors come
14 in.

15 Q You forgot?

16 THE COURT: Mention the exhibit you were looking
17 at.

18 THE WITNESS: You got two doors coming in.

19 MR. CARR: Exhibit 1 is the one I was looking
20 at.

21 Q I know you got two doors. Which door did you
22 use when you reported that afternoon?

23 A Sometimes I come in the engine room.

24 Q Sometimes you use the engine room door?

25	A	Yes.
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1 els

Koa-cross

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2 Q Do you remember which door you used that day?

3 A I forgot.

4 Q When you reported for work at 3.30 did you see
5 any water on the floor of the messroom?

6 A No, 3.30 no water. Nobody come and drink.

7 Q There was no water on the floor at 3.30?

8 A Before, no. Nobody drink this time.

9 Q The messroom had been cleaned up afternoon?

10 MR. ZELENKO: If your Honor please, I object to
11 that question unless there is a foundation for it.

12 THE COURT: If you know.

13 Q After lunch at 12.30 was the messroom cleaned
14 up?

15 THE COURT: If you know.

16 A No, cleaning after breakfast.

17 MR. ZELENKO: The point is, when you say mess-
18 room, it can be the tables, it can be everything.

19 THE COURT: Overruled. I am not going to
20 sustain an objection like that. We will find out whether
21 he got down to the floor, if it was cleaned at all.

22 MR. ZELENKO: I think he answered the question.

23 THE COURT: Then he said there was no cleaning
24 after the lunch.

25 Q Does anybody clean up after lunch?

1 els

Boa-cross

2 A No, no cleaning.

3 Q When you say clean, do you mean mop?

4 A Keep mop every morning after breakfast.

5 Q You mop after breakfast?

6 A Yes.

7 Q After lunch do you sweep up?

8 A No, nobody.

9 Q With the broom?

10 A No, nobody clean.

11 Q Nobody cleans?

12 A Nobody cleans.

13 Q At 3.30, whichever door you used when you came
14 in that afternoon, there was no water on the deck?

15 A A little bit, yes. Somebody drink a little
16 water go out.

17 Q Are you changing your testimony --

18 MR. ZELENKO: I object to that, Judge.

19 THE COURT: No, I don't think so. Because he
20 just got through saying there wasn't any water there.

21 MR. ZELENKO: May we have his answer?

22 THE COURT: Sure.

23 (Record read.)

24 THE COURT: At this time we will take a five-
25 minute recess.

1 els

Koa-cross

2 Please don't discuss the case in the meantime.

3 (The jury left the courtroom.)

4 (Recess.)

5 (In the courtroom in the presence of the
6 jury.)

7 BY MR. CARR:

8 Q At 3.30 when you reported for work --

9 A No, after 3.30.

10 Q What time did you report for work that afternoon?

11 A Dinner?

12 Q For dinner that afternoon?

13 A After 3.30.

14 Q What time?

15 A 3.30, after 3.30.

16 Q 3.30?

17 A Yes.

18 Q When you reported for work for dinner at 3.30 or
19 just after 3.30 --

20 A Yes, after 3.30.

21 Q Did you see any water on the deck in the mess-
22 room?

23 A No, because a little bit fall over, you know,
24 somebody drink.

25 Q Yes or no: Did you see any water on the deck

1 els

Koa-cross

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2 that he is at a pretty clear point now where he understands
3 the point in time that counsel is referring to and he
4 said he understands what is being asked. I think he is,
5 anyhow.

6 Having said that, would the reporter please
7 read the question to him?

8 (Questim read.)

9 A Before a little bit wet, all the time wet.

10 Q Not all the time wet --

11 MR. ZELENKO: Just a minute.

12 I object to counsel saying that.

13 THE COURT: That is an objection that is sus-
14 tained. Strike out the answer.

15 The question is, at 3.30 on the day that you
16 had the accident what, if anything, did you see on the
17 deck?

18 Q Did you hear the Judge?

19 A Yes. I work after 3.30, a little bit wet, you
20 know. Same color, some time I can't see it. Somebody
21 drink, too many people come in the room.

22 MR. CARR: Move to strike as not responsive.

23 THE COURT: I am going to leave it in there and
24 let the jury form their own impression. I don't know
25 that there was anybody there but the cook and steward at

1 els Koa-cross
2 this time, and I don't know what he is talking about,
3 a bunch of people coming in and out. There is no
4 evidence of it at this point.

5 MR. ZELENKO: May I hear the answer, your Honor?

6 THE COURT: All right.

7 (Record read.)

8 THE WITNESS: This is after 4 o'clock.

9 Q Before you fell did you see any water on the
10 deck?

11 A Yes, a little bit.

12 Q A little bit?

13 A Yes, a little wet.

14 Q Where?

15 A I start work, at 3.30.

16 Q Where did you see the water on the deck?

17 A Somebody drink, come water.

18 Q Who came in?

19 A The water machine. Everybody come drink
20 water.

21 Q At 4 o'clock everybody comes in to drink water?

22 A More people come in to drink water, at 4 o'clock,
23 so the water spray on the floor.

24 Q Mr. Koa, did you come down to my office and
25 testify about this case, at a deposition?

1 els

Koa-cross

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2 A Last time?

3 Q Yes, do you remember last time, back in
4 December, 1972? Do you remember coming down to my
5 office?

6 A Yes, a long time ago.

7 Q And I asked you questions. At page 34, line 6
8 were you asked this question and did you give this answer:

9 "Q You didn't notice any water on the floor
10 before you fell down, is that right?

11 "A Before I don't see water, you know,
12 working."

13 Did you give that answer?

14 A I see before, too.

15 Q Did you give that answer, "Before I don't see
16 water, you know, working."?

17 A I see after 3.30.

18 Q After 4 o'clock did you see any water?

19 A No, after 4 o'clock, 4.30, I first saw more
20 water.

21 THE INTERPRETER: Do you want me to explain to
22 him? He doesn't understand.

23 THE COURT: No.

24 MR. CARR: That was in English.

25 Q Did you read over this deposition with Mr.

1 els

Rea-cross

2 Zelenko?

3 A No, I can't.

4 MR. ZELENKO: I can say, Judge, no, he didn't
5 read it over. And it wasn't signed either.

6 THE COURT: Well, he didn't ask that. This
7 must be catching or something, because you have a right to
8 bring all that out when you get the witness back. But when
9 he has the witness he has a right to to conduct the examin-
10 ation in this fashion.

11 MR. ZELENKO: I'm sorry.

12 THE COURT: He didn't ask you whether you
13 remembered whether he read it with you. He asked the
14 witness, "Did you read it over with Mr. Zelenko."

15 That is a simple question and I think he could
16 answer that. Put the question to him.

17 In the last few days before this case came up
18 did you read what you said at that time in December of
19 1972, with Mr. Zelenko in his office? That is the ques-
20 tion. Put it to him.

21 THE WITNESS: Yes. Water on the floor.

22 THE COURT: Wait a minute.

23 Would you come up to my chambers some time and
24 I will explain to you what an interpreter is supposed to
25 do. You are not a lawyer. You are just like an echo

1 els

Koa-cross

2 of what happens. You don't explain anything to him.

3 He just answers the question.

4 If he gives you an answer you tell the reporter
5 what it is and the jury. You don't explain anything or
6 help anybody or hinder anybody or anything like that.

7 The lawyers ask the questions and you put the questions
8 to him if he doesn't understand it.

9 THE INTERPRETER: No, I just repeat. He
10 thought it is today or something, I don't know.

10 11 Q Mr. Koa, how long were you standing there
12 dishing out the salad?

13 A Seven or eight minutes.

14 Q Seven or eight minutes?

15 A Yes.

16 Q Ten minutes?

17 A Yes.

18 Q Who was in the messroom while you were dishing
19 out the salad?

20 A Chief cook, steward. Another messman.
21 Another deck department.

22 Q A deck department man?

23 A Yes.

24 Q Anybody else?

25 A Four people.

1	els	Koa-cross
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2 Q What were they doing?

3 A Somebody --

4 Q What was the chief steward and the chief cook
5 doing?

6 A Sit down, drink coffee.

7 Q They were sitting down at a table?

8 A Yes.

9 Q What was the messman doing?

10 A He was working the table.

11 Q What was the deckman doing?

12 A He talking sitting down too. He finished work.

13 Q Were the chief cook and the steward sitting down
14 at the same table?

15 A Yes.

16 Q What table were they sitting at?

17	A	First table, galley.	Galley first table.
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18 Q Is that the table that is closest to your salad
19 counter?

20	A	No.	Salad different able.
----	---	-----	-----------------------

21 Q I know. Is the table that they were sitting
22 at --

23 A Yes, you got.

24 Q Is that the closest table to the salad counter?

25 A Yes, you got, sit down. Only sit down, coffee.

1 els

Koa-cross

2 Q I show you Plaintiff's Exhibit 1.

3 A Yes. This is the galley first table.

4 Q This is the first table, with the tablecloth
5 on it; right?

6 A Yes, this tablecloth.

7 Q Is that the table where they were sitting?

8 A I don't know pictures, you know.

9 Q Does that look like the first table, to you?

10 A Yes, first table they sit down here. The
11 first chief.

12 Q The first chief was sitting by the first table
13 with the chief steward and they were talking with each
14 other?

15 A Yes.

16 Q And you were standing right here, right at the
17 salad counter?

18 A Yes.

19 MR. CARR: This is the table that has the
20 checkered cloth on it.

21 Q While you were standing there what did the chief
22 steward say to you?

23 A He no say nothing.

24 Q Are you sure?

25 A Yes.

1 els

 Koa-cross

2 Q Did he tell you to sit down?

3 A No, nobody told. I work, I finish in ten
4 more minutes, fifteen minutes, somebody come to eat.
5 Nobody told me.

6 Q You were in a hurry to get finished? You were
7 trying to get finished?

8 A No, because too many people, too many works, so
9 couldn't talk. Not fast.

10 Q Not fast?

11 A No, can't fast. The ship roll.

12 Q Tell me what the ship was doing while you were
13 standing there?

14 A The ship was rolling. It was bad weather.

15 Q Did you have to hold on to anything?

16 A Yes, hold.

17 Q Hold on to what?

18 A Hold leg of the table.

19 Q Hold the table leg?

20 A Yes.

21 Q How far was the ship rolling? Can you tell me?

22 MR. ZELENKO: If your Honor please, I can't --

23 A I can't tell you measurements. Just very bad,
24 the ship was rolling.

25 Q Bad rolls?

1	els	Koa-cross
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2 A Yes, very bad rolls. I fall down. Somebody
3 take me and pants wet and everything.

4 Q When the ship rolled did it knock you off
5 balance?

6 A My pants?

7 Q Not your pants. When the ship rolled did it
8 knock you to the deck?

9 A No, the ship roll, I fall down this way.

10 Q When the ship rolled you fell down this way?

11 A Yes, this way (indicating).

12 MR. ZELENKO: May we indicate on the record
13 what the witness has just indicated?

14 MR. CARR: Going down into a kneeling position.

15 THE WITNESS: Yes, all the way. All the way
16 go pantry. Spray.

17 Q When the ship rolled you slid to the pantry?

18 A Yes, go pantry.

19 Q Did you see the purser?

20 A Yes, I go purser right away.

21 Q Did the purser fill out a report for you?

22 MR. ZELENIKO: If your Honor please, now if we
23 are going into anything other than this liability, I would
24 like to indicate that I would like to know, I think the door
25 is being opened on what happened after that.

1 els

Koa-cross

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2 THE COURT: I couldn't care less what you think
3 about it. I am not restricting any evidence in this
4 case. We are not going to try the damages, but there
5 is no reason the jury shouldn't know what happened.
6 Absolutely none. It's not their function at this time
7 to pass on any damages. Their only function at this
8 time is to determine whether or not the ship is respons-
9 ible. But I don't see this has anything to do with that
10 even, the question of damages, at this point.

11 Q Did the purser fill out a report in connection
12 with your accident?

13 A The purser get me ointment to put on.

14 THE COURT: Strike that out and we will ask you
15 the question that was put by the lawyer.

16 (Question read.)

17 THE COURT: Yes?

18 THE WITNESS: Yes. Captain letter.

19 THE COURT: Please, yes or no.

20 THE WITNESS: Yes.

21 THE COURT: All right.

22 Next question.

23 Q Did the purser ask you how you got hurt?

24 A Yes, he asked me. I say I can't walk, too much
25 blood, bleeding skin.

1 els

Koa-cross

2 Q Did you tell the purser how you got hurt?

3 A I say too hurt, can't work.

4 Q Did you tell him how the accident happened?

5 THE COURT: If you can answer the question yes
6 or no, answer it, do you understand that?

7 Tell him that in his own language.

8 (Pause.)

9 THE WITNESS: Yes.

10 THE COURT: Did you tell the purser how the
11 accident happened?

12 THE WITNESS: He gave me medicine --

13 THE COURT: Yes or no, did you tell the purser
14 how the accident happened?

15 THE WITNESS: Yes.

16 THE COURT: Tell him that in his own language.

17 (Pause.)

18 THE WITNESS: Yes.

19 THE COURT: All right.

20 Go ahead.

21 Q Did you sign a statement for the purser?

22 MR. ZELENKO: If your Honor please, I object to
23 this question, "Did you sign a statement." I have no
24 objection to whether he signed a paper.

25 THE COURT: Sustained as to form.

1 els

Koa-cross

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2 The question is, is this your signature; never
3 mind what it is.

4 Q Is this the report about your accident?

5 MR. ZELENKO: I object to that, your Honor.

6 THE COURT: Sustained.

7 Is his signature supposed to be on there?

8 MR. CARR: Supposed to be.

9 THE COURT: I asked a question which he never
10 answered. Show him the paper. The question is, is
11 that your signature on there?

12 Q Is that your signature, Ah Lou Koa?

13 A No, I can't see this. Too small. Purser not
14 got give me paper to sign.

15 MR. ZELENKO: May I see that?

16 (Hanging.)

17 MR. ZELENKO: I would like to point something out.
18 I was served with a copy of a paper without a signature, as
19 part of discovery.

20 THE COURT: Why do you do that, Mr. Zelenko?
21 That is part of your case. He is putting in his part of
22 the case.

23 THE WITNESS: The witness said he couldn't see
24 it.

25 THE COURT: What about it? What's the next

1 els

Koa-cross

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2 question?

3 Q Can you make out your signature here, Ah Lou
4 Koa?

5 MR. ZELENKO: I object to that, your Honor.

6 THE COURT: Overruled.

7 A No, I don't know this paper.

8 Q I am asking if this is the signature that you
9 put on this paper for the purser?

10 A I don't know. Maybe you know, maybe some-
11 thing --

12 MR. ZELENKO: If your Honor please, I object on
13 another basis. I don't suppose that purports to be the
14 original. That may be a copy of something.

15 THE COURT: I don't know the first thing about
16 it, and I will rule on any objections you make. If you
17 make an objection I will rule on it.

18 MR. ZELENKO: I object to that unless it purports
19 to be an original.

20 THE COURT: I don't know.

21 Is it offered as an original?

22 MR. CARR: It is offered as a carbon copy of an
23 original, your Honor.

24 MR. ZELENKO: I object.

25 THE COURT: Establish a foundation for it.

1 els

Koa-cross

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2 Who has the original?

3 MR. CARR: I have made a diligent for the
4 original, your Honor, and I can't find it.

5 THE COURT: Then the only thing you have in your
6 file is this carbon copy.

7 MR. CARR: This is the only thing I have in my
8 file.

9 THE COURT: I will allow it. There is
10 provision for such acceptance. However, the jury,
11 in determining this particular portion of the case, will
12 keep that fact in mind, that the original has not been
13 produced and it has not been found. The question is,
14 is that a carbon copy or is that a copy of your signature?
15 Did you sign a paper like that?

16 Q Mr. Koa, did you sign a paper like this for the
17 purser?

18 A No, I no. I don't know what this is.

19 MR. ZELENKO: If your Honor please, I object to
20 the question, "Did you sign a paper like that." That is
21 my objection. I do not think it is proper in form.

22 THE COURT: I understand. But no matter how
23 much we get around to semantics in this thing, the question
24 is, did you give the purser a statement and sign it.

25 THE WITNESS: Take maybe something, I don't know.

1 els

Koa-cross

89

2 What you use for this paper. please?

3 THE COURT: Never mind reading that. The
4 question is only whether you signed that. Do you remember
5 signing that kind of a paper?

6 THE WITNESS: No. Maybe declaration something
7 paper.

8 THE COURT: I don't know what happened. You were
9 there, I wasn't there. You know whether you signed a paper
10 or not.

11 THE WITNESS: I don't know this paper.

12 THE COURT: He says he doesn't know the paper.

13 THE WITNESS: I signed some paper for the person,
14 but I don't know which kind of paper.

15 (Defendant's Exhibit A was marked for
16 identification.)

xx 17 Q When the ship got back to New York did you sign
18 a statement about your accident?

19 A No, for what --

20 MR. ZELENKO: Just a moment, please.

21 I object to the form of that question. I have
22 no objection if he is shown a paper and asked if his
23 signature is on it. But I object to the form of the
24 question.

25 THE COURT: Overruled.

1 els

Koa-cross

2 Q Did you sign a statement about your accident
3 when the ship got back to New York?

4 A Yes, insurance company. He told me, he say
5 sign.

6 Q Do you see that man here?

7 A I don't know. I forgot. Three years.

8 Q Do you recognize this man?

9 A I forgot.

10 Q You forgot?

11 A Yes.

12 MR. CARR: I am indicating Mr. Anduiza, your
13 Honor.

14 Q Mr. Koa, is that your signature?

15 A Yes. This I sign.

16 Q Is this the statement that you gave to the
17 insurance man, as you call him?

18 MR. ZELENKO: If your Honor please, I object to
19 that question, unless there is proof that the witness knew
20 it was the statement.

21 I object to the question.

22 THE COURT: Mr. Zelenko, the objection is over-
23 ruled.

24 Q Is this the piece of paper that you signed for
25 the insurance man?

1 els

Koa-cross

2 A He told me --

3 THE COURT: Wait a minute.

4 Mr. Carr, I sustained the objection because he
5 is referring to a piece of paper and not a statement.

6 Go ahead.

7 Q Is this the statement that you signed for the
8 man on the ship?

9 MR. ZELENKO: I object to the word "statement",
10 Judge.

11 THE COURT: Your objection is noted and it is
12 overruled. Nothing in that paper is binding on this
13 plaintiff unless it is made known that he understood what
14 he was signing, whether you call it a statement, a paper
15 or whatever it is. So the objection is overruled.

16 Q Is this the one that you signed when the ship
17 got back to New York?

18 A Yes. He told me to sign, I don't know.

19 MR. CARR: I would like to offer it in evidence,
20 your Honor.

21 MR. ZELENKO: May I question on the voir dire on
22 this?

23 THE COURT: Go ahead.

24 -

25

1 els Koa-cross

2 VOIR DIRE EXAMINATION

3 BY MR. ZELENSKO:

4 Q Mr. Koa, when you signed your name to this paper
5 was y our brother on the ship with you at that time?

6 A My brother told me, he say --

7 Q Was your brother there?

8 A Yes.

9 Q Is he in court now?

10 A Yes.

11 Q Did he sign it also?

12 A Yes, he --

13 Q Did he sign it also?

14 A Yes, insurance man told him.

15 Q Did you read it over before you signed it?

16 A No, I can't read. He can't read too.

17 Q Did you read it over before you signed it?

18 A Yes. Say what he told me --

19 Q Did you read it over?

20 A No.

21 Q What did the man tell you when he told you to
22 sign?

23 A He say you sign, give me \$8 a day, you know,
24 claim. He told me sign, claim, pay me \$8 a day, go
25 doctor, go hospital.

1 els

Koa-cross

93

2 THE COURT: Now we are getting into very chary
3 grounds here. I don't care who started this, but if it
4 keeps going I know where it's going to end.

5 Q Does your brother read English?

6 A Yes, he got --

7 Q Does he read English?

8 A No, just a little talk.

9 Q What does he do?

10 A He is a Chinese restaurant cook.

11 Q Did this man who asked you to sign the paper tell
12 you anything else? Did he tell you what would happen
13 if you didn't sign the paper?

14 A He say me talk the same thing. I say what you
15 do, put it down.

16 Q Did he leave a copy of this paper with you or did
17 he take it away?

18 A No, he take away. I can't read. I sign, he
19 take it.

20 Q But you didn't read it over?

21 A No, I can't read.

22 Q Did you tell him, did you tell this man that the
23 deck was dry or did you tell him it was wet?

24 A I told him wet, fall down, ship roll.

25 Q Did you tell this man that you could not read

1	els	Koa-cross
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2 English too well? Did you tell him that?

3 A Yes, I told him. He ask me, what you put it
4 down. I say the ship roll, fall over, too much water,
5 fall on my feet, I fall down.

6 MR. ZELENKO: If your Honor please, I object to
7 the introduction in evidence of this paper on the ground
8 that it is obviously at least from the testimony of this
9 witness, that his name appears on there but he didn't
10 know what he was signing.

11 THE COURT: Mark it for identification at this
12 time. If a proper foundation is laid I will rule on it
13 at that time.

14 MR. ZELENKO: Thank you, Judge.

15 (Defendant's Exhibit B was marked for
16 identification.)

xx 17 BY MR. CARR:

18 Q Where did this man talk to you?

19 A He asked me same like you now.

20 Q Same questions that I am asking you?

21 A Yes: What you do, what day you hurt, you know,
22 fall down.

23 Q All the details about your accident?

24 A Yes. Same like this asking me. All same
25 like today.

1 els

Koa-Cross

95

2 Q Did you tell him?

3 A Yes. He asked me same like you.

4 Q When he asked you a question did you give him
5 the answer, just like you are giving the answer to me?6 MR. ZELENKO: That is objected to, Judge, the
7 last part, "just like you give the answer to me".8 THE COURT: He means in the same fashion, not
9 content of the answer. But sustained as to form'

10 Q The man asked you about your accident?

11 A He say you sign --

12 Q Wait a minute.

13 MR. ZELENKO: I submit he be permitted to
14 answer.15 THE COURT: He is not answering the question
16 he was asked.17 Q Did this man ask you about your accident,
18 Mr. Koa?19 A He asking me, he say sign. He say this paper
20 for insurance. He say you go hospital, doctor.

21 Q Did he ask you how you got hurt?

22 A Just I don't know how you got hurt, this kind of
23 thing, you know. Just what you do, what you fall down.24 Q Did he write on the paper as you were talking to
25 him?

1 els Koa-cross

2 A I just talking.

3 Q While you were talking did he write down on the
4 paper?

5 A Yes.

6 Q And after he finished did he read it over to
7 you?

8 A I don't know what you say.

9 THE COURT: Let the interpreter ask him that
10 question.

11 (Pause.)

12 A Yes.

13 Q MR. ZELENKO: Just a minute, please.

14 THE COURT: We have an added starter here.

15 (Pause.)

16 MR. ZELENKO: If your Honor please, may I approach
17 the bench?

18 THE COURT: Approach nothing, because I could
19 hear her from here. She has no idea of what she is doing
20 here whatsoever and I cannot just make it clear to either
21 one of them.

22 The answer is stricken, whatever she said, and
23 the reporter will read the question to the interpreter
24 again, and the interpreter will put the question to the
25 witness again.

1 els Koa-cross

2 (Question read.)

3 A Yes.

4 THE COURT: You ask him the question in your
5 language from there. We will read the question to you
6 and read what the question is, to her.

7 (Question read.)

8 (Mrs. Hung interpreted the same question.)

9 A He did not read it to me. He said I just put
10 down what you have answered me.

11 THE COURT: All right. That is the two
12 answers we have now.

13 This interpreter says that he said he did read
14 it. You said he said he told me what he put down.

15 Go and ask the next question.

16 MR. CARR: I don't know which answer to use, your
17 Honor.

18 THE COURT: I don't either. The jury will have
19 to make up their mind what this witness is getting at.

20 I don't know either. Put it to him once more and we will
21 see what he comes up with the third time.

22 I will put it to him. Give me the statement.

23 In front of you, the man asked you questions
24 and wrote on this piece of paper; is that right?

25 THE WITNESS: Yes, he asking me.

1 els

Koa-cross

98

2 THE COURT: Did he read this to you?

3 THE WITNESS: No, he no read it. He just told
4 me sign.

5 THE COURT: Didn't you tell the interpreter a
6 minute ago that he read it to you and you signed it?

7 THE WITNESS: Yes. He just told me sign.

8 Q Didn't you tell this young lady here a minute
9 ago that after he read it to you, you then signed it?

10 THE WITNESS: No tell her, no.

11 THE COURT: You didn't tell her, all right.
12 He says it wasn't read to him and he then signed it.

13 The man offering the statement to him told him
14 what was in it, as I understood the other interpreter.

15 Q This man told you what was on the paper?

16 A No, he no told me.

17 Q He didn't tell you what was on the paper?

18 A No tell. Just was asking me.

19 THE COURT: Now we have a fourth version. He
20 didn't tell him at all.

21 Q Where did you talk to this man?

22 A No, just asking me.

23 Q Where on the ship? Was it on the ship?

24 A Yes.

25 Q Before you got on the ship?

els

Koa-cross

99

1

2

A March 15.

3

Q March 15, you remember that. Was that the

4

day the ship came back?

5

A Payoff day.

6

Q Did you sit down and talk to this man?

7

A No. He ask me, he come to my room on the ship.

8

Q So he went to your room?

9

A Yes, ship room. Bedroom.

10

Q Your bedroom on the ship?

11

A Yes.

12

Q Who was there in the bedroom?

13

A Nobody.

14

Q Just you?

15

A It's a small room. I got three people.

16

My brother, I call on the phone, he come for me.

17

Q So in the room there was you, your brother and

18

the other man?

19

A Yes.

20

Q Did the other man take out a piece of paper?

21

MR. ZELENKO: If your Honor please, we have

22

been over this.

23

THE COURT: I think we have.

24

MR. CARR: We have, your Honor, I submit, four

25

different ---

1 els

Koa-cross

100

2 THE COURT: All right. If you keep going you
3 may get a fifth one, I don't know.

4 Do you want to try for six? I don't get it.

5 MR. CARR: I am trying to lay a foundation,
6 your Honor.

7 THE COURT: You have a very simple way of doing
8 it. That is what he said. He didn't read it; it wasn't
9 read to him, and nothing was explained to him. Now, of
10 course, when your man takes the stand he can tell what he
11 thinks what happened, what he swears to. And the jury
12 will make a choice between them.

13 MR. CARR: I would like to lay the foundation
14 with this witness if I can. Maybe it's impossible.

15 THE COURT: You can't. He claims he simply
16 signed it and doesn't know what was in the statement, of
17 his own knowledge.

18 Q Did your brother sign it too?

19 A Yes, he told me, my brother is talk, he say I
20 am no ship working, I come to New York. My brother call
21 me on the phone, he say no trouble, you sign too.

22 Q Your brother said he was not a ship's worker?

23 A No, he works In New York City.

24 Q Did he tell the man that?

25 A Yes. He say your brother he sign, no trouble.

els

Koa-cross

101

He told my brother that.

Q Did you tell the chief steward about the water on the deck?

A Yes.

THE COURT: If there was water on the deck at that time when you were on duty, who would mop it up?

THE WITNESS: Crew mess.

THE COURT: Did you tell him that there was water there? Was he the one that was standing in the room with you?

THE WITNESS: Yes, every morning he wash.

THE COURT: Did you tell him, heh, there is water over here, clean this up?

THE WITNESS: Before?

THE COURT: Yes.

THE WITNESS: No, he work I see water, he work to this time.

MR. CARR: I think that's all I have of this witness, your Honor.

MR. ZELENKO: No further questions.

THE COURT: Tell him to be careful stepping down the stairs. He can come down.

(Witness excused.)

MR. ZELENKO: If your Honor please, it may be

1 ^{els}
* * *

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2 N I N G L O U K O A , called as a witness by the
3 plaintiff, being first duly sworn, testified as
4 follows:

5 DIRECT EXAMINATION

6 BY MR. ZELENKO:

7 Q Mr. Koa, I want you to talk up and I am going to
8 try to ask you questions in English and I want you to try
9 and answer in English.

10 Are you the brother of Ah Lou Koa?

11 A Yes.

12 Q What is your job, what work do you do?

13 A My job, Chinese restaurant.

14 Q What do you do there?

15 A Cook.

16 Q Do you remember a day in about three years ago
17 when your brother came in with the ship and you went up to
18 meet him?

19 A Yes.

20 Q Did you meet with your brother that day?

21 A Yes.

22 Q I show you this paper and ask you whether this
23 is your name, your signature? That is Defendant's
24 Exhibit B for identification.

25 A Yes, that is my name.

1 els

N. L. Koa-direct

104

2 Q Did you read it before you signed it?

3 A No read.

4 Q Do you see the man here who wrote the paper out?
5 Is he in court?

6 MR. CARR: Your Honor, without the interpreter,
7 please.

8 THE COURT: Yes.

9 A No, I don't remember.

10 THE COURT: Don't volunteer anything because
11 we are still trying to find out if the witness understands.

12 Q The man who wrote the paper, did he read it to
13 you and your brother before you signed your name?

14 A My brother and I together in my brother's room.
15 Just the man come in. My brother signed first, I second.

16 Q Did you read it over?

17 A No.

18 Q Did your brother read it?

19 A No, nothing.

20 MR. ZELENKO: That's all.

21 BY THE COURT:

22 Q Did the man read it to your brother and you?

23 A No, no read it. He said no make no trouble.

24 * * *

25 -

1 els
 ★ ★ ★

N. L. Koa-cross

105

2 CROSS EXAMINATION

3 BY MR. CARR:

4 Q Mr. Anduiza, would you stand up?

5 Is this the man who took the statement? Do you
 6 remember the man who took the statement and wrote it down?

7 A No, I don't.

8 Q Look at this man here.

9 A He talk to my brother, not talk to me.

10 Q This man here talked to your brother?

11 A Yes.

12 Q And after he finished talking to your brother
 13 did he ask your brother to sign it?

14 A He said just you sign, just for insurance
 15 company, I don't know.

16 Q And did your brother sign it?

17 A Yes, my brother signed.

18 Q Did your brother ask you about it before he
 19 signed it?

20 A No, my brother signed maybe just the man he say,
 21 you sign too, because your brother on the ship fall down,
 22 you know.

23 Q Mr. Koa, you are a citizen too, aren't you?

24 A Yes.

25 Q You just became a citizen?

1 els

N. L. Koa-cross

106

2 A Yes.

3 Q How long ago?

4 A Last week.

5 Q Last week?

6 A Yes.

7 Q How long have you been in the States?

8 A Seven years.

9 Q Have you gone to school at all over here?

10 A Every day working, you know.

11 Q No school?

12 A No time.

13 Q Did you have to study at all before you became
14 a citizen?

15 A What?

16 Q Before you became an American citizen did you
17 have to study about the Constitution?

18 A Yes.

19 Q About the Presidents?

20 A Yes.

21 Q Where did you study?

22 THE COURT: He needs help.

23 Q Do you have to read any books?

24 MR. ZELENKO: Just a minute. The Judge said
25 he needs help.

1 els

N. L. Koa-cross

2 MR. CARR: That is what I am trying to do.

3 THE COURT: He turned to the interpreter.

4 Tell the interpreter what is on your mind in
5 answer to that question.

6 (Pause.)

7 A Yes, I read some of this institution, what the
8 lawyer gave me all the sheets to read.

9 THE COURT: You mean the man who was helping
10 him get the citizenship papers.

11 Q Who helped you get your papers?

12 MR. ZELENKO: Your Honor, I object to that question.

13 THE COURT: I didn't see any materiality to that.
14 Sustained.

15 MR. CARR: Mrs. Lin, did you use the word
16 texts?

17 THE INTERPRETER: No, I didn't.

18 Q What did you read?

19 MR. ZELENKO: I object.

20 THE COURT: Sustained. I don't quite see the
21 materiality in that.

22 Q Do you read English?

23 A A little bit.

24 Q You read a little bit?

25 A Yes.

els

N. L. Koa-cross

108

1

2

Q Does your brother read a little bit?

3

A You ask him, you know. I don't know.

4

Q You don't know?

5

A Yes.

6

Q Do you know if your brother reads English?

7

A A little bit. He can't read.

8

Q You read better than your brother?

9

A No, just same, you know, address.

10

Q This man did not read the statement over to you

11

in the cabin?

12

MR. ZELENKO: If your Honor please, we have been
over that already, too.

13

14

THE COURT: Overruled.

15

Q Mr. Koa, this man here, did he read this state-

16

ment line by line out loud?

17

A No, I don't understand.

18

Q You don't understand?

19

A No.

20

THE COURT: Put the question through the inter-
preter.

21

22

(Pause.)

23

A No, no read. I tell you already, no read it.

24

He asked me just two questions.

25

MR. CARR: I have nothing further of this

1 els N. L. Koa-

2 witness.

3 MR. ZELENKO: That's all.

4 THE COURT: I would like to ask him a question,
5 please.

6 Let me see the paper.

7 BY THE COURT:

8 Q Indicating Defendant's Exhibit B.

9 Did you sign your name first or did your brother
10 sign before you?

11 A My brother -- I don't remember. Maybe my
12 brother first.

13 Q You remember now you think that your brother
14 signed first?

15 A Yes.

16 Q Then the man said you sign over here?

17 A Second, yes.

18 Q And you signed on the other side. Before that,
19 before you signed your name, how long had you been there?

20 A This paper?

21 Q Before you signed your name how long were you in
22 the room?

23 A Maybe one hour, I think.

24 Q One hour?

25 A Yes, on the ship.

1 els N. L. Koa-

2 Q The man that gave you the paper, did you hear
3 him talk to your brother?

4 A I don't know what talked. He just ask my
5 brother, how you fall down.

6 Q Did your brother tell him how he fell down?

7 A My brother talked to this man?

8 Q Did he tell this man how he fell down?

9 A My brother tell everybody.

10 Q That is great, but did he tell this man how he
11 fell down?

12 A Bring salad bowl.

13 Q Were you in the room listening with your ear
14 while your brother told the man what happened, how he fell
15 down? Tell the man in his own language?

16 (Pause.)

17 A Yes.

18 Q Did he ask him if there was any water on the
19 deck?

20 A Yes.

21 Q What did your brother say?

22 A My brother say a little wet.

23 Q A little wet?

24 A Yes.

25 Q Did he say anything else about how he fell?

1 els

N. L. Koa-

2 A He say that the ship roll.

3 Q Rolling?

4 A Yes.

5 Q After he talked to him did he write on the
6 paper?

7 A That I don't remember.

8 Q This man here, did he write on this paper after
9 he talked to your brother?

10 A I think just ask him. I don't remember.

11 Q This paper wasn't blank when you got it, was it?
12 Was there writing on there when you signed it?

13 A (No response.)

14 Q Was there any writing on this paper when you
15 signed your name or was it a blank piece of paper?

16 A I don't remember. Two years ago.

17 Q I want to make sure that you're understanding
18 what you are saying and I want the interpreter to ask him.

19 (Pause.)

20 A That was written on that.

21 Q It was written the way it was here and then you
22 signed your name, is that the way it happened?

23 A Yes.

24 THE COURT: All right.

25 -

1 els N. L. Koa-recross

112

2 RE CROSS EXAMINATION

3 BY MR. CARR:

4 Q Mr. Koa, what does this read here, this sentence?

5 A I can't.

6 Q You can't read that.

7 Do you know this word here, the first word?

8 A I no read English. I can't say the name, you
9 know.

10 Q You do read English?

11 A Because I don't know.

12 MR. ZELENKO: He didn't say that, Mr. Carr.
13 He said he signed his name.

14 Q You do read a little English, do you?

15 A Just my name, address, some menu. This I know.
16 This I don't know, you know. I take some paper, he say
17 sign name.

18 Q Do you go around and sign papers that you don't
19 know what is on it?

20 MR. ZELENKO: I object to that. It's argument-
21 ative.

22 THE COURT: Yes, sustained.

23 MR. CARR: I have nothing further.

24 MR. ZELENKO: That's all.

25 * * *

(Witness excused.)

MOTIONS

113

1 els

2 MR. ZELENKO: I have nothing further, your
3 Honor.

4 THE COURT: Is that the plaintiff's case?

5 MR. ZELENKO: Yes.

6 THE COURT: Will the lawyers step up a minute,
7 please.

8 * * *

(At the side bar.)

9 MR. CARR: I make my motion, your Honor.

10 I would like to dismiss the complaint on the
11 negligence count because there was no proof here in the
12 record at all that anybody else on the ship had any knowl-
13 edge of the water that Koa claims was present on the deck
14 before his accident.15 THE COURT: Unless you withdraw it I am going
16 to grant the motion because I don't find the evidence for
17 the jury to go on. The pure speculation on their part
18 at this point on the question of whether or not there was
19 notice and whether or not there was sufficient time after
20 the notice was given to cure the condition. He claims
21 the messman was there, but that he didn't tell the messman
22 because the messman was doing something else. Even if we
23 assume for a minute that the water was there, he hasn't
24 brought notice home to anybody, surely not constructive
25 notice. He hasn't brought actual notice to anybody.

1 els

114

2 It seems to me that further than that, that
3 there was no opportunity to cure this condition.

4 The accident happened almost immediately there-
5 after. Would the required mopping up, he didn't ask the
6 man to mop it up or do anything to it. So on the ques-
7 tion of notice, I don't think the negligence aspect of
8 this case should go to the jury, and if you don't withdraw
9 it I am going to grand the motion.

10 MR. ZELENKO: I would respectfully state to
11 your Honor that I feel the fact that the plaintiff testi-
12 fied that whenever the men came in prior to the day of
13 the accident and prior to that time water would splash on
14 the deck, I submit there is constructive notice.

15 THE COURT: We are talking about the day in
16 question.

17 Where do you show me that there was sufficient
18 time for this defendant to do anything about it, on the
19 day of this accident, assuming that there is sufficient
20 notice that the condition existed from time to time?

21 MR. ZELENKO: The steward was there in the
22 place and I would say that would be enough notice to him.

23 THE COURT: Assuming there is, how much time do
24 you give him to clean it up? The jury would have to
25 speculate a hundred per cent on that, because he hasn't

1 els
2 helped them. There is nothing in the case that helps
3 this.

4 MR. ZELENKO: I will leave it to your Honor,
5 then.

6 THE COURT: The feeling I have in the matter is
7 that essentially the fact situation is the same one that
8 is a predicate for both of them, and in this aspect of it,
9 the blameworthy part of it, you haven't satisfied the
10 burden required, namely that there be sufficient time for
11 the ship to do something about it. Even if I accept
12 your statement that there was constructive notice.
13 So I am going to grant that motion.

14 I will assume there is also a motion on the
15 unseaworthiness, which I deny with an exception to the
16 defendant.

17 MR. ZELENKO: Thank you, your Honor.

18 (End of side bar conference.) * * *

19 THE COURT: These matters that we have just
20 discussed up here at the side bar concern matters of law.
21 They don't concern the jury, and that is why they are not
22 said in your presence.

23 At this point, this is the plaintiff's case, and
24 if you recall in the beginning I said there are two roads
25 to go to Albany, and you go by either the Taconic State

els

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AH LOU KOA

vs.

71 Civ. 3606

AMERICAN EXPORT ISBRANDTSEN
LINES.

New York, February 6, 1974;
10.00 o'clock a.m.

(Trial resumed.)

- -

(In the courtroom - in the presence of
the jury.)

MR. CARR: I would like to call Mr. Anduiza to
the stand.

- -

J O H N A N D U I Z A , called as a witness by the
defendant, being first duly sworn, testified as
follows:

DIRECT EXAMINATION

BY MR. CARR:

Q Mr. Anduiza, by whom are you employed?

A By Haight, Gardner, Poor & Havens.

Q Is that the firm I am connected with?

A Yes, sir.

Q What is your capacity with Haight, Gardner, Poor &

els Anduiza-direct

Havens at the present time?

A I am an associate.

Q Does that mean that you are a lawyer?

A Yes, sir.

Q In 1971 by whom were you employed?

A By Haight, Gardner, Poor & Havens.

Q What was your capacity at that time?

A I was an investigator.

Q As an investigator for Haight, Gardner, Poor & Havens did you have any duties with respect to meeting of certain vessels that would come into this port?

A Yes, sir.

Q Could you describe for us what your duties were?

A The investigator would board the ship with an attorney who would go through the medical log and give us a list of men to see that had either accident or illness on the ship. And then we proceed to locate that man on the ship and interview them, take statements, whatever.

Q In March of 1971 were you assigned to perform these duties aboard the SS Export Champion?

A Yes, sir.

Q Do you remember where it was that you went down to meet the Export Champion when they came in?

A I don't remember that.

1 els

Anduiza-direct

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2 Q Was it in the Port of New York somewhere?

3 A Oh, yes.

4 Q In connection with your duties were you assigned
5 to interview Mr. Koa?

6 A Yes, sir.

7 Q Will you tell us what you did in connection with
8 interviewing Mr. Koa?

9 THE COURT: We know that there are two Koas.
10 Would you specify which one you are talking about?

11 MR. CARR: I am sorry, sir.

12 The plaintiff in this case, the crew member
13 aboard the ship, Mr. Ah Lou Koa.

14 A I recall going to Mr. Koa's room. I located
15 him in his room. His brother was there with him. And
16 I asked him about the accident and took the statement.

17 Q About how long did your interview take?

18 A I couldn't say. Approximately 15, half an
19 hour; I couldn't say.

20 Q 15 minutes to half an hour.

21 Did Mr. Koa have any difficulty with the English
22 language?

23 A Yes.

24 Q After you spoke to Mr. Koa about his accident
25 did you then prepare a statement?

1 els Anduiza-direct

2 A I did.

3 Q Did this statement contain the details of the
4 accident that you obtained from Mr. Koa?

5 A They did, sir.

6 Q You reduced that statement to one written page;
7 is that correct?

8 A That's correct.

9 Q I show you Defendant's Exhibit B for identifica-
10 tion and ask if this statement is in your handwriting?

11 A It is.

12 Q Is that the statement that you took from Mr.
13 Koa at the time of your interview in his cabin?

14 A Yes.

15 Q After you had written down the details of Mr.
16 Koa's accident did you ask him to read it?

17 A I did.

18 Q Did he read it?

19 A He read it.

20 Q After he read it did you ask him whether it was
21 true or not?

22 A I didn't even finish until after he finished
23 reading. I didn't finish until he read it because I
24 was not sure whether he could read the statement or not.

25 Q So what did you do at that point?

1 els Anduiza-direct

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2 A I took the statement, like I do with every
3 person --

4 MR. ZELENKO: I object.

5 THE COURT: Strike out "every person".

6 A I took the statement and read it with him line
7 by line.

8 Q In English?

9 A In English.

10 Q After that did you ask him if the statement was
11 correct?

12 A Yes, sir.

13 Q What did he say?

14 A He said it was true.

15 Q At that point did you ask him to sign the
16 statement?

17 A No.

18 Q What did you do next?

19 A I asked his brother to read it to him.

20 Q Was his brother present during your entire con-
21 versation?

22 A His brother was there all the time.

23 THE COURT: Wait a minute. You are talking
24 over counselor's voice and the reporter would have great
25 difficulty in taking down both at the same time. Wait

Anduiza-direct

Don't override Mr. Carr's voice.

THE WITNESS: Okay.

2 What did Mr. Ning Lou Koa do with the statement,
anything?

A He took the statement and started reading it.

Q Did he read it aloud?

A Aloud.

Q After he finished reading it, what happened?

A Then I asked Mr. Ning to sign it and him, and
Koa.

Q Did they both sign it?

A They both signed it.

Q Did you offer them anything to sign it?

A Nothing at all.

Q Made no offers?

A Never.

Q No promises?

A No, sir.

MR. CARR: Your Honor, I would like to offer evidence.

THE COURT: I will reserve it until Mr. Zelenko
portunity to cross-examine.

You are finishēd with the witness, right?

1 els

Induiza-direct

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2 MR. CARR: Yes, sir -- let me ask the witness
3 one other question.

4 Q Did you ask Mr. Koa about the condition of the
5 deck?

6 A Yes, sir.

7 Q What did Mr. Koa tell you about the condition of
8 the deck?

9 A That it was dry and clean.

10 Q Did that fact go into the statement?

11 A It did.

12 Q Was there any mention by Mr. Koa of water in the
13 messroom at the time of the accident?

14 A Not at all.

15 Q Did you ask Mr. Koa who was present at the time
16 of the accident?

17 A I did.

18 Q What did he tell you?

19 A The chief cook.

20 Q Did you ask Mr. Koa what caused him to fall?

21 A I did.

22 Q What did he tell you?

23 A The rolling of the ship.

24 Q Did he offer any other reason for his fall?

25 A No other reason. * * *

els

Anduiza-cross

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MR. CARR: I have nothing further.
* * *

CROSS EXAMINATION

BY MR. ZELENKO:

Q Mr. Anduiza, at the time in March of 1971 you were an investigator; is that right?

A Yes, sir.

Q And it was part of your job to investigate any possible claims that some seaman might have against the company; is that right?

A Yes, sir.

Q You were working for the attorneys and the American Export Lines at the same time, weren't you?

A Yes, sir.

Q You say that you went on a ship with an attorney?

A Yes, sir.

Q Who was the attorney that went on the ship with you?

A I think his name was Tom Lynch.

Q Is he still in this office?

A No, he is not.

Q Was he a member of that law firm?

A Yes, sir.

Q Did you have to get special permission to go on the ship at that time?

1 els

Anduiza-cross

2 A We always get aboard on the ships, Export Lines'
3 ships.

4 Q At the time that you went on you already knew
5 that Mr. Koa had been injured, didn't you?

6 A No, I did not, sir.

7 Q You mean that you just went on the ship or it was
8 part of your duties to go on the ship and get a hold of the
9 medical log and -- by the way, what is the medical log?

10 A The medical log is where the purser records all
11 the accidents or illness that happens during the trip, during
12 the cruise.

13 Q So you got a hold of that medical log?

14 A I did not, sir.

15 Q Who got it?

16 A The attorney.

17 Q Did you see it?

18 A Sure.

19 Q And after you got a hold of it and you went down
20 and you found Mr. Koa's name, right?

21 THE COURT: Wait a minute. He didn't say he
22 got a hold of it. He said the attorney got a hold of it,
23 although he did see it.

24 Q When you saw it did you see Mr. Koa's name there?

25 A I didn't see the medical log with Mr. Koa's name.

1 els Anduiza-cross

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2 Q Mr. Koa's name was not in the medical log?

3 THE COURT: Mr. Zelenko, he didn't say that
4 either. He said he didn't see the medical log and there-
5 fore how can he answer a question whether Koa's name was
6 in the medical log.

7 Q How did you get Mr. Koa's name to interview him?

8 A The attorney looks over the medical log, records
9 the names with the dates and whatever happened to the person,
10 and we go and seek this seaman all over the ship and try
11 to interview them where we find them.

12 Q Did you see the medical log yourself?

13 A As far as I recall, I did not see it.

14 Q You got Mr. Koa's name?

15 A Yes, sir.

16 Q Was that before he was paid off or after?

17 A I have no idea. Probably before he got paid
18 off.

19 Q You say you went to his room?

20 A Yes, sir.

21 Q Wasn't one of the purposes of going to see Mr.
22 Koa to protect the company against any possible future
23 claim?

24 A We consider that true.

25 Q You consider that true?

1 els

Anduiza-cross

2 Q Did you know that his brother was not a member
3 of the crew at that time?

4 A Yes.

5 Q You knew that both of them had difficulty
6 communicating with you in English?

7 A Yes, sir.

8 Q Before you even asked about the accident?

9 A No. When we started talking about the accident.

10 Q When you started to talk about it?

11 A Yes.

12 Q You didn't get somebody on the ship who spoke
13 Chinese to help you?

14 A I didn't know of anybody else on the ship.

15 Q Did you try to find someone?

16 A I didn't.

17 Q All you wanted to do was get a statement?

18 A His brother spoke Chinese. I don't see the
19 point.

20 Q Which brother?

21 A Ning Lou Koa.

22 Q Ah Lou Koa's brother spoke Chinese?

23 A Yes.

24 Q Did you try to get someone on the ship other
25 than these two men who could help them talk to you?

els Anduiza-cross

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1 A I didn't, sir.

2 Q Did Mr. Koa tell you that he was working with a
3 salad bowl at a table when this accident happened?

4 A I think he said he was walking with the salad.

5 Q Did he say "walking" or "working"?

6 A That is what I understood, walking.

7 Q But you didn't know whether it could have been
8 working?

9 A Could have been working.

10 Q At the table?

11 A He didn't say anything about a table. He said
12 he was walking.

13 Q At the time that you were interviewing him when
14 you started, didn't you know at that time that there were
15 two witnesses, at least two witnesses, to his accident; a
16 cook and the steward?

17 A No, sir.

18 Q When did you find that out for the first time?

19 A When I looked at the file, maybe a year ago.

20 Q Is that the first time you found out --

21 A About the witnesses, the other witnesses?

22 Yes, sir.

23 Q And you mean to say Mr. Koa did not tell you
24 that when he was in the room when the accident happened,
25

els

Anduiza-cross

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that the steward was there and the cook was there?

A He told me the chief cook was there.

Q Did he tell you also that the steward was there?

A He did not, otherwise I would have put it in.

Q All this time you were having difficulty talking with him?

A I understood him, but I understand he has very much difficulty, with a heavy accent.

Q Do you know whether he understood you?

A He did understand me.

Q How do you know that?

A Because we talked. I assume he understands, he gave me the information.

Q You say you assume he understood you?

A He gave me the information.

Q Or was he merely trying to be obliging to you and telling you certain things in order to get off the ship in a hurry?

THE COURT: Sustained.

Mr. Zelenko, the last three or four questions you put to this witness call for the operation of somebody else's mind, and you know traditionally that is not allowed.

Q Did you make your own written record of what

A That is the only record.

A No. The only thing I would make is an entry
any time for a convenient ship arrival.

A Yes, sir.

A I didn't know that.

Q Did he try to read it?

A I took it. He said he read it.

Q Did you see him? Did you ask him to read it aloud?

A I asked him if he could read the statement and he said he could, so I gave it to him. I asked him to read it to me, seeing his difficulty with the language, I took the statement and helped him out line by line.

Q You mean you read it?

A We read it together.

Q When you say read it together, you mean he read it out loud to you?

1 els

Anduiza-cross

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2 A He read it out loud like, "Ah Lou Koa, I live
3 at such-and-such an address," and if he stopped at a word
4 I would read it to him and he would agree to it.

5 Q You would read it out loud?

6 A Yes, sir.

7 Q And tell him what he had said?

8 A Yes, sir. And then he agreed to that.

9 Q He agreed to whatever you told him?

10 A No, sir.

11 Q Did you leave him a copy of the statement?

12 A I hade no way of leaving him a copy of the state-
13 ment.

14 Q Couldn't you write an extra statement and give
15 it to him at the time?

16 A He didn't ask for a copy and it's not the
17 procedure that I use in giving him a copy.

18 Q When you say it's not the procedure that you use,
19 as somebody going down to investigate claims, you say that
20 is not your procedure, to give the person a copy of the
21 statement that you ask him to sign; is that correct?

22 A No, sir, unless he asks me, because he can
23 get it.

24 Q Unless he asked you?

25 A Yes, sir.

1 els Arduiza-cross

2 Q Did you ask him if the deck was wet or dry?

3 A I asked him, the deck, how was the condition,
4 anything on the deck.

5 Q You knew, didn't you, that if the deck was wet
6 the company might be more responsible than otherwise,
7 didn't you?

8 A I didn't ask such a thing.

9 Q You were an experienced investigator when you
10 went down?

11 A Yes, sir.

12 Q And you have investigated a lot of these matters,
13 haven't you?

14 A Yes.

15 Q When you went down, you knew the difference
16 between wet and dry decks and things like that, didn't you?

17 A Yes, sir.

18 Q Your purpose was to get something to protect the
19 company, wasn't it?

20 A No, sir. The purpose to protect --

21 Q Was it to protect Mr. Koa?

22 A No.

23 Q After you spoke to him you knew that he was
24 suffering some injury, didn't you?

25 A I beg your pardon?

els

Anduiza-cross

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Q When you were with him, after being with him for a while, you knew that this man was in pain or he was suffering from an injury, didn't you?

A No, sir.

Q Did you ask him whether or not he had been taken off the ship any place before it came back?

A I don't recall if I did.

Q Did you ask him whether he had been taken off the ship at Yokohama?

A No, I don't recall if I did.

Q Or in San Pedro?

A I don't recall if I did.

Q Did you ask him whether he had been given a certificate to go to Staten Island because of his injury?

A I probably did.

Q Did you ask him whether at the time you were talking to him he was in pain?

A I don't recall if I did.

Q You didn't bother to ask him that, did you?

A It's not bother. I don't recall whether I did or not.

Q If you were interested in protecting him, as you say --

A I didn't say that, sir.

1 els

Anduiza-cross

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2 THE COURT: He didn't say that.

3 MR. ZELENKO: Withdrawn.

4 Q Weren't you interested at the time in talking
5 to the man whether he was in pain from any injury?

6 A No, sir. That is not my job.

7 Q You knew his name came from the medical log,
8 didn't you?

9 A Yes, sir.

10 Q And you knew that if it was in the medical log
11 the man had been injured, didn't you?

12 A Could be illness, anything. Could be for a
13 week.

14 Q And you say that despite that, it wasn't your
15 job to find out anything at all about his injuries or
16 illness?

17 A Of course it was. That is what I did.
18 Find out about his injuries.

19 Q Why didn't you put down on the paper?

20 A Not -- I'm sorry, your Honor, you want me to
21 nower?

22 THE COURT: He is asking you a why question
23 which is very silly for a lawyer to do. If you want the
24 answer, he will give it to you.

25 MR. ZELENKO: I withdraw that.

1 els Anduiza-cross

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2 A He read it in English.

3 Q Out loud?

4 A Out loud. I had to also help him out with
5 words. He even said words in Chinese.

6 Q You had to help the brother out with words, didn't
7 you?

8 A Oh, sure.

9 Q Didn't it become clear to you at the time that
10 you were helping both men out, that perhaps you were not
11 getting the facts down as they occurred?

12 A No, sir.

13 Q Weren't you interested at that time in taking
14 down a fair statement of what happened?

15 A My interest was to take exactly what the plain-
16 tiff said at the time I took the statement.

17 Q When you say plaintiff, a plaintiff is somebody
18 in a courtroom?

19 A I am talking about the plaintiff now, sir.

20 Q But at that time this man was on a ship, there
21 was no lawsuit or anything?

22 A He was not a plaintiff then, no sir.

23 Q Didn't you tell Mr. Carr just now that whatever
24 was told you, you reduced to one page in writing?

25 A I tried to make it as short as possible.

els Anduiza-cross

Q So you didn't put down exactly what was said,
did you?

A Yes, sir. It was a simple conversation we
had.

Q You didn't put down the questions that you asked
him and the answers that he gave you did you?

A The questions and the answers are there.

Q You say on this paper you have got the questio -
and the answer?

A I asked him what his name was. "My name is
Ah Lou Koa."

Q Did you put down question, answer?

A I never have. No, sir, I did not.

Q You just reduced it?

A I just wrote out the answers he gave me, sir.

Q What do you mean by the word "reduce"?

THE COURT: He didn't use the word reduce.

MR. ZELENKO: Mr. Carr used it.

THE COURT: He may have used it, but this
witness hasn't accepted it. He said he simply put down
what the man told him. You then asked him, he reduced
it, he said no.

MR. ZELENKO: Mr. Carr asked him, so I just
used the word.

1 els

Anduiza-cross

2 THE COURT: Let's get on with it.

3 Q Did you hear the brother of Mr. Koa testify
4 yesterday?

5 A Yes, sir.

6 Q Is that the gentlemen that you are telling us
7 read this paper in English?

8 A Yes, sir.

9 Q But you say that he had difficulty with words?

10 A Oh, course. With my writing and reading it.

11 Q With your writing and reading him some words?

12 A Sure.

13 Q At that time didn't you consider it unfair to
14 Mr. Koa that you were putting something in writing which
15 neither he nor his brother fully understood by language?

16 A No, sir.

17 Q Did you make some appointment to meet him, let's
18 say -- at that time did you know that he lives right here
19 in New York City, after you finished?

20 A When he gave me the statement. I think he told
21 me Essex Street or something.

22 Q Then you knew he lived in New York City?

23 A Yes.

24 Q Did you make an appointment to meet him in his
25 home, where somebody could translate for him in Chinese?

els

Anduiza-cross

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A His brother was there.

Q You told us you had difficulty with his brother?

A I didn't have difficulty. He understood everything, like Mr. Koa too.

Q You mean the brother understood everything just as Mr. Koa did?

A They both did.

Q The same way?

A I made sure of that.

Q The both of them had the same understanding of English?

A I couldn't say that, sir.

Q You don't know?

A I don't know.

Q All you know is, you had difficulty and they had difficulty with a lot of the words; isn't that right?

A They had difficulty reading my statement, sir.

MR. ZELENKO: That's all.

I object at this time, your Honor --

THE COURT: Nothing happened yet, Mr. Zelenko. Nobody has offered anything or done anything.

MR. ZELENKO: I think Mr. Carr did offer it.

THE COURT: Wait a minute. I told Mr. Carr that when we got through with the witness, which includes

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* * *

BY MR. CARR:

1 els

Anduiza-recross

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2 and the brother put his name on the paper whether he was
3 under medication at the time?

4 A No idea, sir.

5 Q Did you determine from the medical log whether
6 he had been given any medical?

7 A I never looked at the medical log, sir.

8 Q Did you find out whether or not he had been at
9 any time?

10 A No, sir.

11 THE COURT: Is there a basis in fact you have
12 for asking these questions or are you just asking them?

13 MR. ZELENKO: I am just asking them generally.

14 THE COURT: If you don't have any basis in fact
15 for that, I would sustain an objection. It suggests to
16 the jury a condition which is not provable by you, as I
17 see it at this point, in answer to my question. Something
18 like asking a witness when did you last beat your wife.
19 Of course it assumes that the man did beat his wife. You
20 are making an assumption in that question which you are not
21 able to prove at this time, as I understand.

22 MR. ZELENKO: Except this. We are able to prove
23 by answers to interrogatories that he was sent for treat-
24 ment.

25 THE COURT: I couldn't care less. He could have

1 els Anduiza-

2 done that in San Pedro or Yokohama or four or five other
3 places. We are talking about a time when he was in
4 New York on a ship, perhaps weeks from Yokohama.

5 Have you concluded?

6 MR. CARR: Yes, sir.

7 BY THE COURT:

8 Q You seem to have a second language. What is it,
9 Spanish?

10 A Yes, sir.

11 Q So that you yourself at some time faced diffi-
12 culties with language when you were first starting to
13 learn English?

14 A Yes, sir.

15 Q So this is not unusual to you, to speak with
16 people who have difficulty with the language?

17 A That's correct, sir.

18 Q Something came up the other day of this question
19 of what was in the statement, by the plaintiff, I believe,
20 something about \$8. I want to clear that up. I don't
21 know whether the jury remembers that, but that has nothing
22 to do with the claim before us here. That has something
23 to do with what is called a maintenance and cure claim,
24 which traditionally spells out to \$8 a day.

25 Can we agree on that?

1 els

Anduiza-

2 MR. ZELENSKO: Yes, your Honor.

3 THE COURT: If you remember the \$8 that was
4 spoken at that time, that \$8 was not offered for the
5 statement. It's a discussion about what his rights are
6 under something which doesn't concern us at this time.

7 MR. CARR: May I ask a question on that, your
8 Honor?

9 THE COURT: You may. Mr. Zelenko can too,
10 because I think that figure was said during the course of
11 the testimony and it might confuse the jury.

12 REDIRECT EXAMINATION

13 BY MR. CARR:

14 Q Mr. Anduiza, was money in any amount or any
15 denomination mentioned by you or Mr. Koa during your
16 interview?

17 A No, sir.

18 Q Was the word maintenance used?

19 A Never.

20 Q Was \$8 a day used?

21 A No, sir.

22 THE COURT: I believe everyone is finished.
23 Be careful getting down.

24 (Witness excused.)

25 MR. CARR: I renew my offer, your Honor.

1 els

2 MR. ZELENKO: At this time, your Honor, I would
3 object to the introduction into evidence because on the
4 witness' own statement he said that both persons whose
5 names appear had difficulty with the language with him.

6 THE COURT: You can argue these points with the
7 jury later on. I am going to receive the statement.
8 But I tell you this, generally this is a law on the ques-
9 tion of statements. Ordinarily, if you sign a paper the
10 law assumes that you know what you are doing and you know
11 what's in the statement and you are responsible for what
12 is in there. However, there are conditions sometimes
13 which you require you to make a further inquiry, did the
14 man in fact read the statement; did the man if he read
15 the statement, understand what it was; is he capable of
16 understanding a statement of this kind; what are the
17 interests of the people who are involved in taking the
18 statement.

19 There are many considerations here. But it is
20 a question for you. You will finally determine whether
21 this is in fact what the plaintiff told the witness or
22 whether it isn't. That is a judgment for you to make.
23 You will hear argument on both sides of this question later
24 on and you will adopt whatever argument you feel has
25 validity based on the facts as you find them.

DEFENDANT'S EXHIBIT B ADMITTED IN EVIDENCE

129a

1 els

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2 (Defendant's Exhibit was received in
3 evidence.)

xx 4 MR. CARR: May I read it to the jury, your
5 Honor?

6 THE COURT: You may.

7 (Mr. Carr read to the jury from Defendant's
8 Exhibit B in evidence.)

xx 9 MR. CARR: Your Honor, I would like to read a
10 deposition at this time, if I may.

11 May I use Mr. Anduiza as a witness?

12 THE COURT: Yes. I will explain to the jury
13 what phase this is.

14 Sometimes witnesses are not available or for
15 soem other reason a statement is taken of him under oath
16 and the both lawyers are present; they both ask questions
17 and it has the same force and effect as if the witness
18 came into the courtroom and was sworn before you.

19 What is happening now is that the lawyer's
20 assistant is going to act as a witness and Mr. Carr is
21 going to act as the one who is doing the questioning.
22 The questioning is done by both lawyers, so at one time he
23 will be questioning on behalf of the ship and on other
24 portions of it Mr. Zelenko might want to bring to your
25 attention, these questions will be asked on behalf of the

1 els
2 * * *

"Eley

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MR. CARR: Yes, sir.

THE COURT: All right. Then you are refer-
ring to Plaintiff's Exhibit 2.

MR. ZELENKO: It is the same table.

THE COURT: What I had originally asked, Mr.
Carr, is that the one you were using when you were examin-
ing him at the time of the deposition?

MR. ZELENKO: Yes.

THE COURT: All right.

MR. CARR: If I may show the jury where the X
has been placed, at the front of this counter here, you
see an X right on one of the door.

(Pause.)

MR. CARR: Continuing on page 12, line 12:

"Q What was he doing at this table?

"A He was putting a salad bowl, taking salad from
the bowl and putting it into saucers, when he give each man
individual dishes.

"Q Was he doing this when you first entered the
messroom?

"A No.

"Q How long were you seated before he started doing
that kind of work?

"A I would say approximately five minutes, I guess,

1 els

"Eley

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2 because when I first got into the messroom he was in the
3 pantry and he came out of the pantry and started with the
4 salads.

5 "Q How long was he working at that position before
6 his accident?

7 "A I guess just a very short time.

8 "Q During that time was anything said by anyone
9 in the room?

10 "A Yes.

11 "Q What was said?

12 "A The ship was rolling and the chief steward told
13 him to sit down, to take it easy, and he neglected to do
14 what the chief steward said" --

15 MR. ZELENKO: Your Honor, at that point I moved
16 to strike out the balance of the answer.

17 THE COURT: And he neglected to do it, what was
18 stricken.

19 The warning I will allow. But the mental
20 operation indicating neglect on his part, I will strike
21 that part of it. That is for the jury to determine,
22 whether there was neglect or not.

23 MR. CARR: Page 14, line 5:

24 "Q How far away were you sitting from the messman
25 as he was standing at the table there?

1 els

"Eley

2 "A I was quite aways. Not quite aways.

3 "Q About how far?

4 "A I would say from --

5 "Q Does that chair that you are sitting on, is that
6 shown in this photograph?

7 "A No.

8 "Q Is the chair that you were sitting on shown in
9 this photograph?

10 "A Yes.

11 "Q Are you referring to Defendant's Exhibit C for
12 identification, marked at plaintiff's examination before
13 trial?

14 "A Yes.

15 "Q What chair were you sitting on?

16 "A That first one right behind the container of
17 milk.

18 "Q That is the chair that is next to the entrance
19 door?

20 "A Yes.

21 "Q Would you put an E right there on that chair so
22 we know where it was you were sitting?

23 "A Yes.

24 "(Witness complies.)"

25 MR. CARR: And he complied on a photograph that

1 els "Eley
2 has been marked Plaintiff's Exhibit 1 in evidence during
3 the trial, your Honor.

4 MR. ZELENKO: May I just see it?

5 (Pause.)

6 MR. ZELENKO: No objection.

7 (Pause.)

8 MR. CARR: Line 8, page 15:

9 "Q Do you recall the exact words the steward used
10 when he was talking to the messman?

11 "A Yes.

12 "Q What words did he use?

13 "A The steward called him by his name and told him
14 to sit down and take it easy because the ship was rolling.

15 "Q Did he use these words?

16 "A He said it two, three times..

17 "Q Did Mr. Koa say anything at all in response to
18 what the steward said?

19 "A I don't believe he did.

20 "Q Did you hear this plainly from where you were
21 sitting?

22 "A Yes.

23 "Q After that, what happened?

24 "A After that, he fell on his butt and slid into
25 the pantry.

1 els

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2 "Q He slid across the deck into the pantry?

3 "A Yes.

4 "Q From where you were sitting were you able to
5 observe the condition of the deck?

6 "A Yes.

7 "Q What was the condition of the deck?

8 "A The deck was dry. There wasn't water on the
9 ground as far as I know because it was dry at that time.

10 "Q Did you see any water anywhere on the deck in
11 this messroom?

12 "A No.

13 "Q Could you describe the motion of the ship for us?
14 Not being seamen, could you tell us?

15 "A She was rolling like this," after that Mr. Zelenko
16 moved to strike the balance of the answer.

17 MR. ZELENKO: I consent that he read the rest
18 of it.

19 THE COURT: The part that he objected to at the
20 time he consents that it be read now, unless you decline
21 to do so. Then Mr. Zelenko can read it.

22 MR. CARR: All right. The balance of the
23 answer was:

24 "But may I add this. The deck has tiles
25 on the deck and if you haven't got some kind of rubber

1 els

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2 shoes, bottoms to kind of brace yourself, you are going
3 to slide.

4 "Q After he fell on his butt and slid across the
5 deck, what happened next?

6 "A He got up and the steward asked him, "You hurt
7 yourself?" He said no. He brushed himself off and that
8 was the end of it as far as I know about it.

9 "Q Who was the messman's boss?

10 "A The chief steward.

11 "Q Were you his boss?

12 "A The chief steward was his boss. We are both
13 the bosses because I work under the direction of the chief
14 steward.

15 "Q Do you recall the name of the chief steward?

16 "A Yes.

17 "Q What was that?

18 "A Sam Milton.

19 "Q Had he been on the ship for some time?

20 "A Yes. He was on when I came aboard there myself.

21 "Q Did the messman have any duties as far as picking
22 up stores?

23 "A Yes. He's got duty of picking up stores.

24 "Q How would he go about these duties of picking up
25 stores?

1 els "Eley

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2 "A He just checked his menu and as he needed for
3 his table and he get it.

4 "Q When he can check his menu, are you referring
5 to the menu that is printed on the ship?

6 "A The menu is printed on the ship by the chief
7 steward.

8 "Q Every day a new menu?

9 "A Yes."

10 Skipping a line:

11 "Q Does the messman also take orders from the crew
12 as to what they want for the meal?

13 "A Yes, that is part of his duties.

14 "Q What does he do when you got an order from one of
15 the crew members?

16 "A Then he walks to the hole that is on the picture
17 and he tells the third cook or one of us in the kitchen
18 what food he wants and then give it to him.

19 "Q Did you ever hear the messman call out his
20 orders?

21 "A Yes.

22 "Q When you were working in the messroom" --
23 that should be in the galley.

24 MR. ZELENKO: It says messroom.

25 MR. CARR: I know.

1 els

"Eley

2 "A Yes.

3 "Q Were you able to understand what he was saying?

4 "A Yes.

5 "Q Do you know whether or not the messman continued
6 with his duties after the accident?

7 "A Yes.

8 "Q Do you have any idea what part of his body he
9 injured?

10 "A At that time he said his leg and he said it
11 wasn't hurt, so that was like I told you. I know the
12 steward asked him he was hurt and he said he wasn't.
13 He brushed himself off and got up."

14 And Mr. Zelenko moved to strike the balance of
15 the answer. And then I said no further questions.

16 MR. ZELENKO: May we have a short recess,
17 Judge, because I have to read the lengthy deposition.

18 THE COURT: It seems to me you should have
19 thought of that yesterday and read it through. But we
20 will give you a five-minute recess to refresh your recol-
21 lection.

22 MR. ZELENKO: I am all refreshed, but I'll have
23 to be on my feet for quite a while.

24 THE COURT: That's all right. I am just
25 suggesting in about five or ten minutes we ought to be

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"Q Had you ever served with this plaintiff, this Chinese man, before this trip?

"A I never seen him in my life.

"Q Do you tell us he spoke English well?

"A Yes!

"Q He spoke English well?

"A Yes, as far as I know.

"Q Did you ever have any conversation with him in English?

"A No. The only conversation I have is when he comes to the window and orders his food. That was it.

"Q You understood him clearly?

"A Yes.

"Q By taking --

"A As far as I know, by giving him orders.

"Q Did you speak to anybody before today at any time concerning this accident?

"A No.

"Q Did you sign any paper for anybody?

"A No.

"Q About what you say in regard to this accident?

"A No.

"Q Are you testifying today just from memory as to what happened? * * *

1 els
2 * * *

"Eley

"A No.

3 "Q When he came and spoke to you, are you telling
4 me that you didn't know he was a lawyer for the company?

5 "A No.

6 "Q Did he show you any identification?

7 "A I didn't know, no. He just told me his name.

8 "Q What is it?

9 "A I don't know his name. I got other things
10 to think about on the ship.

11 "Q Did he identify himself?

12 "A He told me he was down here on behalf of the
13 company.

14 "Q Of whom?

15 "A On account of the Comden.

16 "Q Did you use the word Comden?

17 "A What is that?

18 "Q The man came on the ship?

19 "A Yes.

20 "Q He said he came down here to get a statement from
21 you?

22 "A Were you aboard the ship at this time when this
23 Chinese fellow got hurt on the ship, he said.

24 "Q You told us?

25 "A He said who was on the ship. I said Sam Milton.

1 els "Eley

2 I said I was there.

3 "Q Did you ask the man who came down to take the
4 statement, besides giving his name?

5 "A He told me his name.

6 "Q He told you his name. Did he tell you that he
7 was a lawyer for the company?

8 "A I can't recollect that.

9 "Q When he came down on account of, he used the word
10 Conden?

11 "A He told me, I am here to get a statement from
12 you. Were you in the messroom when this fellow got hurt,
13 and I said --

14 "Q You told us that. Please don't repeat that.
15 That is not a question. Other than giving you his name
16 did this man tell you who he was, what was his job and
17 where he was from?

18 "A He told me he was a lawyer, I believe.

19 "Q For whom?

20 "A For the company.

21 "Q For the company?

22 "A Yes.

23 "Q That is what I asked?

24 "A I believe he told me that.

25 "Q That is what he told you?

1 els "Eley

2 "A Can I say more?

3 "Q No, wait for the question. You told us that
4 after you heard the steward tell this Chinese man to sit
5 down, that the Chinese man didn't answer him; is that
6 right?

7 "A Yes.

8 "Q He didn't answer him?

9 "A Yes.

10 "Q Was the steward in back of the Chinese man or
11 was the Chinese man facing the steward?

12 "A The steward was in back of the Chinese man.

13 "Q The steward was sitting in back of the Chinese
14 man?

15 "A Yes.

16 "Q The Chinese man was facing the salad table?

17 "A Yes.

18 "Q So were you?

19 "A No, I --

20 "Q Weren't you in back of the Chinese man?

21 "A Absolutely not. I am sitting completely
22 here.

23 "Q You indicated on the picture where you were
24 sitting?

25 "A Yes. * * *

1 els

"Eley

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* * *

2 "A Not to my recollection.

3 "Q You say that the steward told the Chinese man
4 to sit down more than once?

5 "A Yes.

6 "Q How many times?

7 "A I cannot remember right off exactly how many
8 times, but I know he told him two or three times to sit
9 down.

10 "Q The Chinese man didn't answer at all?

11 "A No.

12 "Q The Chinese man kept on working?

13 "A Yes.

14 "Q He was working on the salad as far as you could see?

15 "A Yes.

16 "Q And the steward, you heard the steward call the
17 Chinese man telling him to sit down, but the Chinese man
18 didn't answer but kept on working on the salad?

19 "A Yes.

20 "Q You don't know of your own knowledge whether the
21 Chinese man heard the steward call him, tell him anything,
22 do you, at that time?

23 "A No."

24 I move to strike the rest of the answer out,
25 your Honor.

1 els

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2 THE COURT: Strike it out.

3 MR. ZELENKO: Going to page 47:

4 "Q You don't know of your own knowledge, I am not
5 asking you to suppose anything, whether the Chinese man
6 heard the steward; you don't know that?

7 "A I cannot say that.

8 "Q But you do know that he kept on working?

9 "A I do know that he fell on his butt.

10 "Q I ask you to look at Exhibit D and ask you if
11 you can point to the drinking fountain there or water
12 fountain on the picture?

13 "A On the picture?

14 "Q Yes.

15 "A Yes.

16 "Q Would you please mark it in red with a W?

17 "A Yes.

18 "Q Was that the water fountain?

19 "A Yes.

20 "Q For people to drink from?

21 "A Yes.

22 "Q How do you have water come out of that? How was
23 it used?

24 "A By pressing a little button on the top where the
25 water comes out.

1 els

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2 "Q In other words, you press one button to have
3 the water come out so you can drink?

4 "A Yes.

5 "Q And there was a spigot?

6 "A Yes.

7 "Q That you can push to fill up the pitchers?

8 "A Yes.

9 "Q Was the ship rolling quite a bit at that time?

10 "A Yes.

11 "Q Wasn't there water coming or dripping from that
12 spigot, do you know?

13 "A Not to my recollection.

14 "Q You didn't look to see?

15 "A Not to my recollection.

16 "Q Did you ever see water drip out of that fountain
17 at any time?"

18 MR. CARR: Objection, your Honor.

19 THE COURT: At any time, I would sustain the
20 objection. At the time in question I will allow.

21 MR. ZELENKO: If your Honor please, may I be
22 heard?

23 THE COURT: If it is within reasonable limits
24 I will allow it, but there are no time limits whatsoever,
25 and we know this fellow sailed quite a bit on the ship.

1 els

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2 I think the question is faulty and I will sustain an
3 objection to it.

4 MR. ZELENKO: I would press my point that I
5 be permitted to read this answer.

6 THE COURT: I noted my ruling and you have an
7 exception.

8 MR. ZELENKO: I continue.

9 "Q Was there ever any mat put under that?

10 "A Mat?

11 "Q Yes, some kind of mat?

12 "A Not to my recollection.

13 "Q What was the color of the deck?

14 "A Light, like between the color of an egg shell
15 and light.

16 "Q Would it be difficult to see water there because
17 of the color of the deck?

18 "A It is not difficult to see water if water is on" --

19 MR. CARR: Objection. That part of the answer
20 is all right, but I objection to any further portion of that
21 answer as not being responsive.

22 THE COURT: Let me see it.

23 (Pause.)

24 THE COURT: Sustained. The answer required
25 a yes or no answer and he volunteered some other inform-

1 els "Eley

2 ation.

3 I sustain the objection.

4 MR. ZELENKO: Continuing:

5 "Q Would there be water there but you wouldn't be
6 able to see it because of the color of the tile?"

7 MR. CARR: Objection, your Honor.

8 THE COURT: Let me see it.

9 (Pause.)

10 THE COURT: I will allow it. The answer
11 actually called for yes or no, but I will allow it.

12 MR. ZELENKO: Continuing:

13 "Q Could there be water there but you wouldn't
14 be able to see it because of the color of the tile?

15 "A It is possible.

16 "Q You have been in this messroom for a while?

17 "A Yes.

18 "Q Have you seen water on the deck?

19 "A Yes."

20 MR. CARR: Objection.

21 THE COURT: I will allow it. Overruled.

22 MR. ZELENKO: Continuing:

23 "Q Have you seen water from time to time on the
24 deck?

25 "A Yes. Every time they drink there."

1 els

"Eley

2 MR. CARR: Same objection.

3 THE COURT: Overruled.

4 MR. ZELENKO: Did the jury hear the question
5 and answer?

6 "Q Is it difficult to see water unless you are
7 looking for it because of the color of the tile?

8 "A If the deck is wet, if you look for it, you can
9 see it.

10 "Q But it would be wet because you wouldn't notice
11 it because of the color of the tile?

12 "A Could be. I don't see how."

13 Page 50, line 14:

14 "Q Do you know how often that messroom is mopped?

15 "A Every day.

16 "Q When?

17 "A In the morning.

18 "Q But then it is used during the day?

19 "A Yes.

20 "Q It is used to feed the crew?

21 "A Yes.

22 "Q What time does the crew come in for the morning
23 meal, approximately?

24 "A They come --

25 "Q When I am talking about time, I am talking about

1 els

"Eley

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2 the time of the accident.

3 "A In the afternoon, you mean?

4 "Q All the time you have been on the ship as a
5 cook, would you say that the mealtime generally was about
6 the same time?

7 "A Yes.

8 "Q Every day breakfast or lunch would be about the
9 same time, around the time of the accident?

10 "A Yes.

11 "Q About what time of the day was the messroom
12 cleaned for the crew mess?

13 "A In the morning after breakfast.

14 "Q What time?

15 "A Between 9 and 10.

16 "Q About what time is lunch served?

17 "A Lunch is served between 11.30 and 12.30.

18 "Q During lunchtime the men come in to eat?

19 "A Yes.

20 "Q About how many men did you have to feed in the
21 crew at that time?

22 "A A full crew.

23 "Q About how many men?

24 "A It may be 26 men.

25 "Q And the men come in from all over the ship?

1 els

"Eley

2 "A Yes.

3 "Q From the engine room and the deck?

4 "A Yes.

5 "Q Would any of the men use the drinking fountain,
6 to your knowledge?

7 "A Yes.

8 "Q Would they use the drinking fountain to drink
9 from?

10 "A Yes.

11 "Q Who would be in charge of filling the pitchers?"

12 MR. CARR: There is a word left out of this
13 answer, I believe.

14 MR. ZELENKO: You mean I left something out?

15 MR. CARR: No, the answer you are about to read
16 does not contain --

17 MR. ZELENKO: Well, I will read it the way it
18 is, Judge.

19 "Q Who would be in charge of filling the water
20 pitchers?

21 "A The men.

22 "Q Water pitchers would be put on the table?

23 "A Yes.

24 "Q For the use of the men?

25 "A Yes.

1 els

"Eley

2 "Q What time did this accident happen, if you
3 remember?

4 "A They were getting ready to fix supper, set the
5 table."

6 Page 53:

7 "Q About what time did the accident happen?

8 "A It was before suppertime. The exact time I
9 cannot remember.

10 "Q Half-past three, four?

11 "A Somewhere in the neighborhood.

12 "Q You didn't make any inspection, did you, of the
13 messroom, when you came in, about three-thirty or four?

14 "A No. I came into --

15 "Q You either stood at the door or sat down?

16 "A That's right.

17 "Q You didn't go through the messroom?

18 "A No.

19 "Q You don't know whether it was clean and dry?

20 "A I was there in the messroom right at the door.

21 "Q You were at the door?

22 "A Yes, and it was dry.

23 "Q There were tables there?

24 "A Yes.

25 "Q And you were sitting, you were standing or

1 els "Eley
2 sitting at the time of the accident?

3 "A That's right.

4 "Q You didn't make any inspection of the messroom
5 to see if the floor was dry?

6 "A No.

7 "Q So that when you testified today that the deck
8 of the messroom was clean and dry, you only mean from where
9 you were either sitting or standing?

10 "A Naturally, I didn't inspect it.

11 "Q You came in to take a rest?

12 "A Yes.

13 "Q You didn't particularly notice what the condition
14 of the room was?

15 "A No."

16 I will go to the bottom of page 54:

17 "Q Working with the salad, it is talking about
18 the plaintiff?

19 "A Yes.

20 "Q Just what happened at that moment?

21 "A The ship rolled and he went with it.

22 "Q Did he slip?

23 "A I guess so. He was standing there and he
24 just went with it.

25 "Q Did his legs go out from under him, as far as

1 els

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2 you saw him?

3 "A As far as I saw he went on the deck.

4 "Q You used the expression he went down on the
5 butt; is that right?

6 "A Yes.

7 "Q You mean his rear?

8 "A Yes.

9 "Q His buttocks?

10 "A Yes.

11 "Q You saw him go right down on the buttocks, on
12 his butt?

13 "A Yes.

14 "Q Didn't you see his legs go out from under him
15 as he went down?

16 "A He slid towards the pantry.

17 "Q As he slid didn't his legs go out from under
18 him?

19 "A I guess so.

20 "Q And he slid?

21 "A Yes.

22 "Q And he slid all the way across to the pantry?

23 "A Yes.

24 "Q What happened to the salad bowl he was working
25 with?

1 els

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2 "A Still on the work bench."

3 Now I go down to page 57, line 18:

4 "Q Didn't somebody in the room, the steward or the
5 other messman, pick up the Chinese man after he slid across
6 the floor?

7 "A I cannot remember that.

8 "Q You don't remember whether he got up himself?

9 "A I know he got up.

10 "Q You saw nobody help him up?

11 "A I cannot remember.

12 "Q You don't remember?

13 "A No.

14 "Q They may have helped him up, but you don't
15 remember: is that right?

16 "A That's right.

17 "Q But you didn't go over to him?

18 "A No."

19 Line 22:

20 "Q After he slid across the pantry, all you did
21 was go back to the galley?

22 "A Yes.

23 "Q You didn't do anything to assist him?

24 "A Right."

25 Now I want to go to page 62, line 15:

1 els

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2 "Q On the day you signed this statement you knew
3 his name?

4 "A May I say something?

5 "Q Answer the question.

6 "On the day you signed this statement you knew
7 his name, didn't you?

8 "A No.

9 "Q Who told you his name?

10 "A This gentleman here.

11 "Q The lawyer?

12 "A Yes."

13 Now I am going to page 66, line 11:

14 "Q Just before the time of the accident did you
15 notice whether the Chinese man had put a towel on the salad
16 table?

17 "A No, he got a rubber mat up there.

18 "Q Did you notice whether he had put a towel on the
19 table?

20 "A No.

21 "Q I am not talking under the table, I am talking
22 on the table?

23 "A On the work bench, yes.

24 "Q Yes, the work bench.

25 "A There is a rubber mat up there.

1 els "Eley

2 "Q On the work bench?

3 "A I had not noticed that he put a towel because
4 there is a rubber mat there and it stays there all the
5 time.

6 "Q On top of the table?

7 "A Yes."

8 Now I am going to page 71, line 21.

9 "Q Do you know whether the drain in the water
10 fountain was working properly at the time of the accident?

11 "A Not to my recollection, I didn't look for that.

12 "Q You don't know?

13 "A I don't know.

14 "Q The water from the fountain went into the drain
15 in the pipe?

16 "A Yes.

17 "Q But you don't know whether it was draining
18 properly that day?

19 "A I don't know. I didn't go over looking for
20 that.

21 "Q Whose job would it be to find out whether the
22 drain was working properly?

23 "A It is anybody's job if it is plugged up to
24 report to the steward immediately."

25 I skip a line. Line 15:

1 els

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2 "Q If the steward is in the room he is supposed
3 to check everything, check if everything is in working
4 order?

5 "A Yes.

6 "Q You said in regard to the mopping of the deck,
7 you said it is the job of either one of the messmen to do
8 that?

9 "A Both messmen.

10 "Q You don't know of your own knowledge whether or
11 not who did the mopping on the morning of the accident?

12 "A I don't know.

13 "Q It might have been the other messman?

14 "A Yes."

15 Page 73, line 19, talking about the plaintiff:

16 "Q You saw him working at the salad bowl?

17 "A Yes.

18 "Q While the ship was rolling?

19 "A Yes.

20 "Q Before you even heard the steward say anything
21 to him do you know whether there was anything at the salad
22 table, at the work table which provided a handhold for the
23 Chinese man to hold on to while he was working at the ship
24 and his ship was rolling?

25 "A No more than that buffet there.

1 els

"Eley

2 "Q You mean the table?

3 "A Yes.

4 "Q In other words, he had to do his job the best
5 he could?

6 "A More or less.

7 "Q Under the conditions?

8 "A Yes, more or less."

9 THE COURT: Apparently they are examining the
10 record. I will take a five-minute recess at this time.
11 See if there is anything further you want to
12 read.

13 MR. CARR: It won't take any time, your Honor.

14 THE COURT: All right. We will take five
15 minutes.

16 (The jury left the courtroom.)

17 (Recess.)

18 (In the courtroom - in the presence of the
19 jury.)

20 MR. CARR: I am just going to read a couple of
21 portions here.

22 Page 69, line 12:

23 "Q Whose job is it to clean the deck in the messroom?

24 "A His job. Both messmen's.

25 "Q The two messmen?

1 els "Eley

2 "A Yes.

3 "Q And if something should spill during the course
4 of the meal?

5 "A They should get it up.

6 "Q It is their job to clean it up?

7 "A Yes."

8 THE COURT: I indicate to the jury, which I
9 think is my understanding of the portion that you are
10 reading, this is during the examination by Mr. Zelenko
11 after you had concluded your examination.

12 MR. CARR: I believe it is, your Honor.

13 THE COURT: It is cross-examination, isn't it?

14 MR. CARR: I think it is, your Honor.

15 Is that right, Mr. Zelenko?

16 MR. ZELENKO: Yes.

17 MR. CARR: Your Honor, I would like to go back
18 to page 36.

19 THE COURT: What portion of this? Is this the
20 direct?

21 MR. CARR: This would be cross-examination.

22 It was the portion that Mr. Zelenko left out. It followed.
23 Here is the question:

24 "Q What did you remember about this accident to
25 Mr. Koa from the date it happened?" * * *

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AFTERNOON SESSION

(2.15 p.m.)

(In the courtroom - in the presence of
the jury.)

THE COURT: You may proceed.

MR. CARR: Mr. Milton, please.

--

SAMUEL MILTON, called as a witness by the
defendant, being first duly sworn, testified as
follows:

DIRECT EXAMINATION

BY MR. CARR:

Q Mr. Milton, would you speak up nice and loud so
everyone in the jury can hear you.

What is your occupation?

A Chief steward.

Q Is that on ships?

A On the ships.

Q How long have you been sailing?

A 30 years.

Q How long have you been sailing as a chief
steward?

A 25.

Q Were you assigned to the Export Champion in

1 cls

Milton-direct

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2 January of 1971?

3 A I went aboard in September 1970.

4 Q As chief steward?

5 A As chief steward.

6 Q How many men do you have working in your depart-
7 ment?

8 A 11, counting myself.

9 Q The 10 men that worked under you, where were they
10 assigned and what were their jobs on the ship?11 A You have a chief cook, second cook, third cook;
12 galley man, galley man.

13 Q Do those men work in the galley?

14 A In the galley. Then you have two messmen top-
15 side. That messman 1, messman No. 2. Then you have
16 two more messmen down in the crew mess, messman 3 and
17 messman 4. One more messman, messman 5; he takes care
18 of the rooms. Then you have the steward utility.

19 Q And that is it?

20 A Yes, that's right.

21 Q Messman 3 and messman 4 are assigned to the crew
22 mess?

23 A Yes, crew mess.

24 Q Do these two men, 3 and 4, have the same duties?

25 A They both have the same duties until after a

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2 half hour, then one would start dishes while the other
3 finished serving. But when the meal first begins both
4 of them have to serve.

5 Q Do these two messmen have any duties as far as
6 cleaning the messroom?

7 A Well, after half the meal the one that is working
8 in the pantry, he would clean the pantry. The other one
9 would clean the mess hall on the outside. After 9 o'clock
10 in the morning one would mop the pantry and one would mop
11 the mess hall. After that, if there is any spills, either
12 one could mop it up.

13 Q Do you have a set time each day that they would
14 do the mopping?

15 A Well, they go to work 7.30 in the morning.
16 They start serving from 7.30 until 8.30. Then from 8.30
17 until 9.30 they clean up the mess hall, pantry.

18 Q Is there any cleaning done after the lunch meal?

19 A Only sweeping up. They sweep up after each
20 meal.

21 Q After lunch and supper?

22 A After lunch and dinner.

23 Q If there are any spills during lunch whose job
24 would it be to clean that up?

25 A Either one that is in there because they both

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2 would be in there setting up the tables, see. After
3 lunch when they are completely finished they wouldn't come
4 back in the mess hall until 4 o'clock. There is a
5 coffee time in between for the deck gang or whichever gang
6 is working. So if they come back --

7 MR. ZELENKO: Pardon me. Would you ask Mr.
8 Milton to speak a little slower.

9 THE COURT: Read the answer as you got it so
10 Mr. Zelenko can hear it.

11 Would you just talk a little bit louder and
12 slower.

13 (Record read.)

14 Q What time would they quit after the luncheon
15 meal is served and finished?

16 A Well, after lunch they are supposed to work
17 until 1.30. But if they are finished at 1 it's all right
18 too, see.

19 Q The next time that they would be called upon to
20 work in the messroom would be what time?

21 A They would come back to work at 4 o'clock.
22 They would work until 6.30. They would serve from
23 4 to 5. Then they have this other half an hour to clean
24 up again.

25 Q They serve from 4 to 5 --

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1 A I'm sorry, from 5 to 6. They then from
2
3 6 to 6.30 to clean the messroom, see.

4 Q Did you as chief steward make inspections of
5 the messroom?

6 A Every morning.

7 Q What time?

8 A After they leave out, about a quarter of 10.
9 I had to make it between those times because they have the
10 deck gang and engine have the coffee time. So I have to
11 get in there before they come in, see.

12 Q Your inspection would take place in the morning
13 before 10 o'clock?

14 A Before 10 o'clock.

15 Q Did the master ever make inspections of this
16 area?

17 A He made it two or three times a week. But no
18 one knew when he was coming or nothing, see.

19 Q Who did Mr. Koa report to when he first came
20 aboard the ship?

21 A Report to me, because he is working in my
22 department.

23 Q Do you recognize Mr. Koa in this courtroom?

24 A Yes. Sitting there.

25 Q So when he first came aboard did he see you?

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2 A He came to me with his shipping slip, so then
3 I told him where he's have to go find his room and what
4 mess hall he'd be working in.

5 Q Did his job require an ability to speak and
6 understand English?

7 A Well, it would require him to speak English and
8 understand English, because when he came to me, if he
9 couldn't have spoke no English I would have sent him back,
10 because I do not speak Chinese.

11 Q Let's go back to the afternoon of January 18,
12 1971. Do you remember that date?

13 A I remember.

14 Q Is there anything about that day that stands out
15 in your memory?

16 A Well, Mr. Koa had an accident that day.

17 Q How was the weather that day, Mr. Milton?

18 A It was very bad, very rough.

19 Q What effect does that have on the movement of
20 the ship?

21 A Well, this type of ship, if it's rolling, it was
22 like that. But when it's pounding, when it hit the
23 wave like that, the back aft do just like that, and every-
24 thing just gets up in the air, see.

25 THE COURT: He made a lot of motions during that

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2 testimony.

3 Would you go slowly over the answer so he can
4 put some of them in.

5 (Record read.)

6 THE COURT: He made a motion it was rolling.
7 Is that from side to side or pitching?

8 THE WITNESS: When it's pitching it's doing like
9 that --

10 THE COURT: He moved his hands the way Redd
11 Fox does in the movies when he is indicating certain
12 individuals. What is that after?

13 (Record read.)

14 THE COURT: At this point when you said that,
15 you were describing a pitching motion. Yu were moving
16 your hand forward as if it were the prow of the ship and
17 hitting on the water.

18 THE WITNESS: That's right.

19 THE COURT: What's after that?

20 (Record read.)

21 THE COURT: He indicated with his hand a back
22 and forward motion to the side which I would describe as
23 maybe indicating some sort of vibration.

24 THE WITNESS: It's a vibration.

25 THE COURT: The ship can do just one thing,

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2 roll; other times it can pitch, but sometimes it can do
3 both; is that it?

4 THE WITNESS: That's right.

5 THE COURT: All right.

6 Q Did there come a time that afternoon when you
7 visited the crew messroom?

8 A Yes, I was in the crew mess. I went in there,
9 I went through the galley at 3.30. I went into the crew
10 mess exactly 4 o'clock.

11 Q What door did you use in entering the crew mess-
12 room?

13 A I came from the galley door through the crew
14 mess door.

15 Q You say you used the galley door?

16 A From the galley door to the crew mess door.
17 There is two ways to enter the mess hall.

18 Q Is the galley door that you used shown in this
19 photograph which is Plaintiff's Exhibit 1 in evidence?

20 A The galley door is not shown, but it's a little
21 foyer here. Comes from the galley to the mess hall.
22 Right in between there is a little foyer that leads you
23 right back into the galley. It's a stairwell in between
24 going up this way. But the foyer is right there.

25 THE COURT: He is indicating the left portion of

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2 the photograph.

3 Q Is this door on the left-hand side of the photo-
4 graph the one you entered through when you came into the
5 messroom that afternoon?

6 A That is the door.

7 Q Where did you go as you came in through that
8 door?

9 A As I came in through the door I came around here,
10 around over here, sit right there.

11 Q When you say sit right there, where were you
12 sitting?

13 A In the first table in the messroom.

14 Q On the side of the table that is closest to the
15 door or on the other side?

16 A On the far side.

17 Q Does the chair that you were sitting in show on
18 that photograph?

19 A That is the chair right there.

20 Q Is that the chair that is on the very left-hand
21 side of the photograph?

22 A That's right.

23 MR. ZELENKO: Mr. Carr, just indicate what
24 exhibit he is talking from.

25 THE COURT: He did. It is 1, I think.

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2 MR. CARR: Yes, it is.

3 THE COURT: He stated that in his questioning.

4 Q There are three chairs on the --

5 A Each side.

6 Q On each side of the table?

7 A That's right.

8 Q And the chair that you were sitting in --

9 A There is four chairs on each side of the table.

10 It shows four on this side but you can't see the four on
11 this side.

12 Q Is the chair you were sitting in shown on the
13 photograph?

14 A It's shown right here.

15 Q That is the chair that is on the left-hand margin
16 of this picture?

17 A Right.

18 THE COURT: Put his initials on there, SM.

19 Q Could you put your initials, SM, on the back of
20 the chair so we can see which one you are talking about?

21 (Witness marks.)

22 MR. CARR: May I show that to the jury?

23 (Pause.)

24 Q Was there anybody else in the messroom when you
25 came in?

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2 A There was the chief cook, James Eley.

3 Q Was there anybody else?

4 A There was the other messman.

5 Q Another messman?

6 A That's right. There was two messmen in there.

7 Q Were the two messmen in the messroom at that
8 time?

9 A They both was there.

10 Q What were they doing at that time?

11 A Well, they were setting up the tables.

12 Q How did they go about setting up the tables?

13 A That kind of ship, they fold the tablecloth
14 over the condiment rack. Then when they get ready to
15 set the tables up, just straighten them out, get the silver-
16 ware from the drawer, and start setting them up. On calm
17 days one would be putting the glasses while the other one
18 would be putting the silverware. After they finish that,
19 then they go to the icebox or storeroom, which issues the
20 stores at 7, 11 and 4, to pick up whatever they needed.

21 Q For that particular meal?

22 A If they didn't need anything, then they wouldn't
23 have to go.

24 Q You are describing your regular routine?

25 A That's right.

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2 Q Is this the way the tablecloths are folded?

3 A That is the way they are folded.

4 THE COURT: Indicating?

5 MR. CARR: Indicating Plaintiff's Exhibit 2 in
6 evidence, your Honor.

7 Q That is when the tables are not in use?

8 A That is when they are finished with the meal.

9 Q Was it necessary for Mr. Koa to communicate
10 in English within the course of his duties in the mess-
11 room?

12 A Yes, it was.

13 Q In what way?

14 A Well, the first part of the meal, the first half
15 an hour, he and the other messman serve. In order to
16 serve you have to take the order from the crew, call it in
17 the window to the cooks.

18 Q When you entered the room around 4 o'clock that
19 afternoon did you observe the condition of the deck?

20 A I observed the condition because I always look
21 around when you come in there after coffee.

22 Q What was the condition of the deck as you observ-
23 ed it, when you entered the messroom that afternoon?

24 A It was clean. No spills or nothing.

25 Q What portion of the deck did you look at when

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2 you entered?

3 A The way I went and the way I sit, I had to see
4 the whole deck, because I had to come all the way around
5 the end of the table to get to the chair where I was sitting
6 at.

7 Q Would that have taken you next to the counter
8 where the salad is prepared?

9 A Right.

10 Q What happened after you sat down, Mr. Milton?

11 A It seems when I was sitting there talking, and
12 about 15 minutes after, say 15 minutes after 4, the second
13 cook brought the salad out. On rough days we have a
14 stainless steel breakbox --

26 15 MR. ZELENKO: I object to that part of the
16 answer when he talks about rough days. I have no objection
17 as to what happened, which is the question, what happened
18 after that.

19 THE COURT: Lay a foundation.

20 MR. CARR: Yes, sir.

21 Q You say the second cook brought the salad out.
22 Do you mean he passed it out through the window?

23 A He brought it out.

24 Q Does that mean passing it out through the
25 window?

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2 A That means comes all the way around, out the
3 door, out the galley, out the door, putting it in the
4 breadbox.

5 Q What was the salad in when he brought it into
6 the messroom?

7 A A round mixing bowl about this size.

8 THE COURT: Indicating about --

9 MR. CARR: I think we had a stipulation before.

10 THE COURT: I know. But he made an indica-
11 tion with his hand.

12 THE WITNESS: It would be about a five-gallon
13 bowl. About two feet.

14 THE COURT: About two feet across, the diameter.

15 Q What did he do with the salad bowl that after-
16 noon?

17 A Well, when it's rough weather --

18 Q No, what did he do that afternoon?

19 A He put it in the breadbox.

20 Q He put the salad bowl in the breadbox?

21 A Can I explain about that?

22 Q Yes.

23 A He has to put it in the breadbox because the
24 salad bowl has a round bottom, so he sits it in the bread-
25 box so it won't turn over in rough weather.

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2 Q Is the breadbox shown --

3 A It's shown. Stainless steel box in the corner
4 next to the silver box. That is where we always kept it.
5 It's fastened down.

6 Q It is a stationary breadbox?

7 A Stationary.

8 Q Is it shown in this photograph, Plaintiff's
9 Exhibit 2?

10 A That would be the breadbox right in that corner
11 right there.

12 Can you make it out?

13 Q Yes. That is the pice of stainless steel
14 equipment that is right in the very corner of the room ?

15 A That's right.

16 THE COURT: Mark what he has indicated the bread-
17 box to be.

18 Q Make a B there for breadbox.

19 (Witness marks.)

20 Q You have made a B on this and underneath the B
21 you have put a X and you have drawn a line underneath the
22 X with an arrow pointing to the breadbox. That is under-
23 neath on the counter underneath the window, is that correct?

24 A Next to the silverware.

25 Q Is the salad bowl placed in that breadbox every

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2 afternoon?

3 A Not every afternoon. Only when it's rough
4 weather.

5 Q Is that where the second cook put the salad bowl
6 that particular afternoon?

7 A That's right.

8 Q How are the crew served their salad?

9 A Well, on rough days we put a few dishes there --

10 Q Let us just start with a calm day, first.

11 A On a calm day the little cabinet you see right
12 there by the breadbox, they make the salads and put them
13 all on the counter. Anyone wanting a salad, they just
14 come by and lift up the plate and take it with them.

15 Q Who dishes the salad out?

16 A Either one of the messmen.

17 Q Either one?

18 A That's right.

19 Q Is this done routinely at every suppertime?

20 A Every suppertime. The first one to get
21 through with what he is doing when the salad comes out, he
22 will dish it up.

23 Q And the individual dishes of salad are then
24 left on this counter here?

25 A That's right.

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2 Q What happens on a rough day?

3 A On a rough day we just put about six dishes
4 out there. Any crew member wants salad, he would come
5 by and dish up his own.

6 Q So that the individual servings are not prepared
7 on a rough day?

8 MR. ZELENKO: I think he said he puts about six
9 dishes out.

10 THE COURT: Six dishes are made and anybody else
11 who wants it, he takes it out of the bowl; is that right?

12 THE WITNESS: That's right. Six dishes are
13 made. And anybody else want salad, he gets his own.

14 Q So the salad is scooped out and put in about
15 six dishes on a rough day?

16 A The six dishes are put there because there is
17 six men going on watch.

18 Q While you were seated at this table talking to
19 the chief cook did Mr. Koa come into the messroom?

20 A Well, he came into the messroom and he started
21 to dish up the salads.

22 Q What happened next?

23 A Well, he had dished up six dishes when it started
24 to getting rough. So I told him to sit down. I told
25 him twice to sit down, it's too rough. But he wanted to

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2 make two more salads.

3 MR. ZELENKO: If your Honor please, I move to
4 strike the rest of that out, "He wanted to." I don't
5 think this witness can do that.

6 THE COURT: I don't know. He might have told
7 him.

8 MR. ZELENKO: He didn't say he told him.

9 THE COURT: Is this what you yourself saw him do
10 or what he told you?

11 THE WITNESS: I was sitting there in the mess
12 hall.

13 THE COURT: Did he say to you he wanted to make
14 two more?

15 THE WITNESS: He said he was going to make two
16 more salads.

17 THE COURT: He said that to you?

18 THE WITNESS: Yes, sir.

19 THE COURT: Then the objection is overruled.

20 Q He said he wanted to make two more?

21 A Two more salads.

22 Q When he said that had you already told him to
23 sit down?

24 A I had told him to sit down twice.

25 Q What happened after he said, "I want to make

1 els Milton-direct
2 two more"?

3 A The salad dishes are kept in a cabinet, that
4 same cabinet. He went to reach down to get two more
5 dishes. The ship went into a roll and a quiver, as I
6 demonstrated a little while ago, throwing him off his
7 balance, and he slipped from the counter there all the way
8 into the pantry, which he still held on to the salad bowl.

9 When he fell in the pantry, he fell on the salad
10 bowl, his knee and ankle hit the deck.

11 Q So that when he slid across the deck he took
12 the salad bowl with him?

13 A Yes.

14 Q When he bent down to get the two other dishes
15 was he holding on to anything aside from the salad bowl?

16 A Not besides the salad bowl. There wouldn't
17 have been anything he could have held on there.

18 MR. ZELENKO: Move to strike that, your Honor.

19 THE COURT: All right. He didn't say anything,
20 but we will stop him at this point. He was going to
21 volunteer something which he hasn't done yet, so there is
22 no need for my striking anything.

23 Q Was there anyone else in the messroom at the
24 time?

25 A Just the four of us.

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2 fell on it, inspect the place and make out a statement.

3 I make out the statement in two forms which I
4 give to the purser to be sent to the office somewhere.

5 Q Did you prepare such a statement on this
6 particular day?

7 A I did.

8 Q Is that the statement containing the results of --
9 MR. ZELENKO: That is objected to, your Honor.

10 THE COURT: Yes. The statement speaks for
11 itself.

12 Q Mr. Milton, is this is a copy of the statement
13 you prepared on the afternoon or the day in question?

14 (Pause.)

15 A Yes, this is a copy.

16 Q Is that your signature on the bottom?

17 A This is my signature on the bottom.

18 Q At what hour is that statement prepared?

19 A That statement was prepared at 1800.

20 Q What does that mean, for the jury? The jury
21 doesn't know what 1800 means.

22 A 7 o'clock in the afternoon. On the 18th,
23 the same day.

24 THE COURT: The ship uses Navy time and Green-
25 wich time, doesn't it?

1 els

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2 THE WITNESS: Yes, Navy time.

3 THE COURT: That is why you run around 24 hours
4 instead of stopping at 12.

5 Q Did you actually do the typing on the statement?

6 A I do all of my typing.

7 Q All the typing in the steward's department?

8 A That's right.

9 Q Is this statement the document that you prepare
10 routinely when there is an accident in your department?

11 A Whenever there is an accident in my department
12 I check the area and I make out the statement.

27 13 Q Is it in the regular course of your business to
14 prepare such a statement, as chief steward, when an accident
15 takes place?

16 A Only in my department.

17 MR. CARR: I offer the statement, your Honor.

18 MR. ZELENKO: If your Honor please, I will
19 object to this as self serving.

20 THE COURT: Sustained.

21 Q Mr. Milton, is there a drinking fountain in this
22 messroom?

23 A Yes, by the door that is leading aft.

24 Q During the course of that particular two-month
25 voyage did you have any problems with that drinking fountain?

1 els

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2 A None at all.

3 Q Was there any leakage from that fountain?

4 A No.

5 Q Any spillage?

6 A If there is a guy drinking water there may be a
7 little water spilt on the deck. But when the messman --

8 MR. ZEKENKO: Just a minute. I object to any-
9 thing after the word "but".

10 THE COURT: It only invites another question.

11 Objection sustained.

12 When there was spillage, what if anything did
13 you do?

14 THE WITNESS: When the messman come to work,
15 then he mop it up.

16 THE COURT: Suppose it happened while he was
17 doing his work and he saw it there: what would he do?

18 THE WITNESS: Well, one would have to stop and
19 mop it up, because --

20 THE COURT: Never mind because. That is what
21 his duty was.

22 THE WITNESS: Right.

23 Q Mr. Milton, is the messroom on the same deck as
24 the crew's quarters?

25 A No, it's not.

1 els

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2 THE WITNESS: It's above the weather deck.

3 The mess hall is on this deck but you can't get to it from
4 the outside.5 THE COURT: He's indicated three levels and in
6 order to get up to the upper level you have to go up what
7 they call a -- what do you call it?

8 THE WITNESS: A stairwell.

9 THE COURT: In order to get on it you have to
10 either go up and go down or you have to go through some
11 other way.12 THE WITNESS: That is the only way you can get
13 up there. To get into the mess hall you have to go up
14 from the outside stairwell, go in the passageway, then go
15 down another stairwell, to get to the mess hall.16 Q Is there any traffic in the mess hall after
17 coffee time in the afternoon?18 A Well, the only traffic would be through there.
19 They have what they call a night brunch.

20 Q When is that?

21 A It's put in the box after 6 o'clock in the
22 afternoon.23 Q I mean between coffee time in the afternoon and
24 your supper meal, is there any traffic in the messroom?

25 A The only person would come through there would

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2 be an oiler or an engineer. Because there is two ways
3 to get out of the engine room. They can use that way or
4 they can go aft.

5 Q Can you tell me what the relationship was
6 between Mr. Koa and the chief cook?

7 MR. ZELENKO: That is objected to, Judge.

8 THE COURT: Sustained as to form.

9 Q Can you tell me whether or not Mr. Koa and the
10 chief cook were on friendly terms?

11 MR. ZELENKO: That is objected to, Judge.

12 THE COURT: What, that they were on friendly
13 terms?

14 MR. ZELENKO: I don't see the relevancy.

15 THE COURT: I may have great relevancy.
16 He might have hated him; he might have said something to
17 hurt him. I think it is relevant.

18 Overruled.

19 A I never saw them arguing. In Pusan, Korea,
20 I saw them go uptown together a couple of times.

21 MR. CARR: I have no further questions.

22 * * *

22 CROSS EXAMINATION

23 BY MR. ZELENKO:

24 Q Mr. Milton, you said when Mr. Koa fell down he
25 slid all the way across the room with the bowl in his hand?

1 els

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2 A Yes, sir.

3 Q How big is that bowl?

4 A Well, it's about that size. But it's aluminum,
5 see. Some stainless steel and some is aluminum.

6 Q Was there salad in it?

7 A Salad in it.

8 Q Did any of the salad spill while it was sliding
9 across the floor?

10 A Only when he fell, but he went so fast --

11 Q He slid very fast. Was he holding on the bowl
12 with the two hands as he slid across the floor?

13 A That's right.

14 Q What part of his body was on the floor?

15 A From here, you know, from the knees and the legs,
16 and his arm after he fell, that would be the salad bowl
17 along here somewhere.

18 Q In other words, you are telling us that as he
19 slid across the floor he was on his knees?

20 A He didn't slide backwards -- I mean he didn't
21 slide forward. He slid backwards.

22 Q He was sliding backwards on his knees?

23 A Not his knees. Only his knees was touching
24 because he was going so fast.

25 Q Was he down on what the cook calls his butt, his

1 els

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2 backside?

3 A He wasn't down all the way there until he landed
4 in the pantry. But he wasn't on his backside then. He
5 fell forward, see.

6 Q He was sort of halfway down holding the bowl as
7 he slid across the floor?

8 A You got it wrong. See, let's take, he would
9 be over like that slide, but he can't get over that far.
10 And his feet would be back this sliding and he was holding
11 the bowl. When he fell, that made him fall forward.
12 That is how the knees and his ankle hit.

13 Q Just before he fell he was sort of leaning over
14 the salad table, right?

15 A He was at the salad table.

16 Q Just before he fell he was at the salad table?

17 A At the salad table.

18 Q And he was holding the bowl?

19 A He was holding the bowl with one hand. Then
20 he reached down to get the dishes. Before he could get
21 the cabinet open, this roll come.

22 Q Let me get this straight. He was holding the
23 bowl with one hand, you say, and he is reaching down, right?

24 A Yes. But he is reaching --

25 Q And then the ship rolls?

1 els

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2 A That;s right.

3 Q And then he starts to slide?

4 A That's right.

5 Q What did he do as he started to slide, grab the
6 bowl with the other hand; is that what he did?7 A He had to grab the bowl because the bowl was
8 right along with him. He had taken the bowl out of the
9 breadbox so he had to grab the bowl because the bowl was
10 going right with him then.11 Q You are telling us, here the man is sliding
12 across the floor, but before he starts to slide he's got
13 one hand on the bowl, but as he starts to slide he grabs
14 the bowl with the other hand and then finishes the slide;
15 is that right?

16 A That's right.

17 Q What part of his body was on the deck was on the
18 deck as he was sliding across?19 A I am trying to explain to you now, there wasn't
20 nothing touching but his feet and they wasn't hardly
21 touching, it happened so fast.22 Q As he was sliding across the deck there wasn't
23 anything touching the deck but his feet; right?

24 A That's right.

25 Q And you say his feet were hardly touching?

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els

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1
2 A That's right.

3 Q You mean he flew through the air?

4 A Just like that.

5 Q With the bowl in his hand?

6 A That's right.

7 Could I explain something to you?

8 Q No, just a minute. Answer the question.

9 What hit the pantry door first, the bowl?

10 A Didn't nothing hit the pantry door. He went
11 inside the door.

12 Q He went right through the door?

13 A Right through the door.

14 Q With the bowl in his hand?

15 A Yes.

16 Q And his feet off the ground?

17 A Just about off the ground.

18 Q He flew through the air, right?

19 A Not quite. His feet was touching.

20 Q You said his feet were hardly touching?

21 A They hardly touching. But when you say fly,
22 that means his feet is completely off.

23 Q He was taken right through the air, right through
24 the door with the bowl in his hands. About how many feet
25 did he go along before he went through the door of the

1 els

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2 pantry?

3 A I'd say about 20 feet.

4 Q Can you point out from where you are sitting
5 about where you think 20 feet is in relation to me?

6 A The 20 I mean is when he landed in the pantry.
7 I'd say from me to that railing in back there.

8 Q To this railing?

9 A Yes.

10 MR. ZELENKO: Indicating the railing at the end
11 of the jury box.

12 Does the Court clerk have any measurement?

13 THE COURT: You look on the squares on the
14 ground and they are one foot each.

15 MR. ZELENKO: There are no squares here, your
16 Honor. There is carpeting.

17 Can we stipulate that that is about 30 feet?

18 THE COURT: It is up to Mr. Carr. I don't want
19 to make any judgment about it.

20 Is that about 30 feet?

21 MR. CARR: I guess it is, your Honor.

22 THE COURT: All right. Approximately 30 feet.

23 Q You say that the cook was in the room before
24 this thing happened, right?

25 A Chief cook.

1 els

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2 THE COURT: He has answered about three or
3 four times, Mr. Zelenko. You have a right to cross-
4 examine, but you haven't got a right to go over it 56
5 times.

6 Was he right on top of the salad bowl when he
7 was laying at that time?

8 A He was on top. This part landed on top.

9 Q His chest landed on the salad bowl?

10 A That's right.

11 Q Was he up against the wall of any kind?

12 A Just flat on the deck.

13 Q Was he up against the wall any time?

14 A Not right. Just up on the deck.

15 Q He was facing with his body downwards, his chest
16 on the salad bowl and his feet out in back of him; is
17 that what you found?

18 A Feet out in back?

19 Q Is that right?

20 A That's right.

21 Q What did you do to him at that point?

22 A I went over to him, to help him get up and asked
23 him if he was hurt. He said one knee and an ankle.
24 So I told him to go see the ship's purser.

25 Q Did you look at his knee?

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Q Do you deny that you used the expression,
"I came in the galley exactly 4 p.m."?

A I came in the mess hall at 4 p.m.

Q Exactly 4 p.m.?

A Yes, that's right.

Q You said that?

A That's right.

Q How do you know that it was exactly 4 p.m.?

A Because I issued the stores from the storeroom
at 4, so I check to see who wants anything.

Q You usually do that?

A Every day.

Q Some days maybe a little earlier?

A Not all the time.

Q But it's possible, isn't it?

A It's possible.

Q Another thing. You told us how the tables are
set on calm days. How are the tables set on stormy
days?

A They are set exactly the same way, but it's no
glasses set on the table. The silverware is rolled in
napkins and laid on the table to keep from rolling down.

Q Coming back to this roll that sent Mr. Koa
flying through the air, were you drinking any coffee at

1 els

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2 A Still working for the company.

3 Q What did they do, fly you up here from where you
4 were?

5 A They flew me up here from Norfolk.

6 Q You testified that there was an inspection every
7 morning before 10 of the messroom, right?

8 A Both messrooms and passageways.

9 Q What kind of an inspection was it that you made?

10 A Well, I go around, I look at all the decks, I
11 look in the corners, I look at the stairwells, tabletops,
12 some of the rooms.13 Q Is it your statement that Mr. Koa speaks good
14 English?15 A I couldn't say he speaks good English, but he
16 speaks enough to understand.17 Q Just like if you are talking about a menu or to
18 follow orders or something like that, is that right?

19 A That's right.

20 Q While he worked for or under you, was he a good
21 worker?

22 A He was a good worker.

23 Q Did follow orders all the time?

24 A I didn't have no trouble with him at all.

25 THE COURT: Were there any other Chinese in the

1

els

Milton-cross

2

Q Then he started to work at this table?

3

A Yes.

4

Q What was the deck of the messroom made of?

5

A Tile.

6

Q If there was water on the tile could you see it

7

just by walking or --

8

A You could see it.

9

Q Wouldn't the water be the same color as the tile,

10

most of the time?

11

A Not this time.

12

Q I am not talking of this time; generally?

13

A It wouldn't be hard to see.

14

Q You said not this time?

15

A I said not this time.

16

Q What was the color of the tile?

17

A It was sort of a -- it's between -- I don't know,

18

it's pretty hard. Something like a beige. Something

19

like a light beige.

20

Q You told us that there were six men going on

21

watch shortly after this accident happened, supposed to go

22

on watch?

23

A They go to eat.

24

Q They eat first?

25

A They eat at 5 o'clock.

1 cls

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2 Q Six men, is that what you said?

3 A That's right.

4 Q They would come in to eat before any of the rest
5 of the men?6 A They all would come in here, but this six would
7 have to be fed first. That is what we call a watch.8 Q That is why the six salad dishes had to be
9 filled, for them?10 A Most of the time we let them fill them, but he
11 had started on them, so we just left it at that.12 Q You saw Mr. Koa working at the salad bowl before
13 the accident some time, didn't you?

14 A That's right.

15 Q Did you see him dish ing out the salad?

16 A He was dishing out the salad.

17 Q While you were talking to the chef you were
18 watching him?

19 A I was looking at him. We wasn't talking then.

20 Q You were talking to the chef, weren't you?

21 A But when the second cook brought the salad in
22 there I quit talking to him. Because when he went to fill
23 the salad bowls, that is when I was looking at him.

24 Q What you are saying is this:

25 You were talking to the chef until the second

1 els Milton-cross

2 cook came out with the salad bowl?

3 A That's right.

4 Q And then you stopped talking to the chef and
5 you kept your eye on Koa?

6 A That's right.

7 Q Did you see Koa ladling some of the salad into
8 these little salad dishes?

9 A Well, he got the bowl and started filling up
10 salad dishes. Six, that's all that was up there.

11 Q Did you see him do that?

12 A I saw him do that.

13 Q As he was doing it was he holding one hand
14 around the bowl and another holding a spoon of some kind?

15 A That's right.

16 Q You saw him doing that. In what hand was he
17 holding the spoon?

18 A He was holding the spoon in his right hand and
19 he was holding the bowl with his left hand.

20 Q Holding the bowl with his left hand and holding
21 the spoon with his right hand?

22 A That's right.

23 Q You saw that?

24 A That's right.

25 Q You remember that clearly?

cls

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Q You said that he reached down to get a couple of more little salad dishes?

A That's right.

Q While this was going on the ship was rolling, wasn't it?

A It wasn't rolling at first when he fixed the six. But like I explained to you, once it hit a hard bump it does a little of everything.

Q Do you say that while he was ladling in the salad in small dishes the ship was not rolling?

A It was rolling, but not as bad as it hit the hard roll.

Q Was the ship rolling as you saw him put the salad into the little dishes?

A Not rolling bad.

Q Not bad?

A What you call a tremor like, from the pounding.

Q Wasn't the weather very rough that whole day?

A It was rough that whole day. But when the ship is falling forward like that, all you get is the pounding now and then. But when it hit a side roll wave, that is when you get the hard roll.

Q Was it rolling pretty hard when he was dishing out the salad in the little bowls?

1 els

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2 A It wasn't rolling as hard as it was when he
3 went.

4 Q How long was he doing this before it started to
5 roll?

6 A Well, it started just as he got to the last dish
7 and went to reach for the other one.

8 Q Then it gave a big roll?

9 A Yes.

10 Q What happened to you?

11 A I was still sitting in the chair.

12 Q You weren't even thrown out of your chair?

13 A No.

14 Q What happened to the cook?

15 A Sitting in his chair.

16 Q Nothing happened to him?

17 A Because we can hold on to the rim of the table,
18 too.

19 MR. ZELENKO: Move to strike that out.

20 THE COURT: Strike it out.

21 Q Nothing happened to you?

22 A Nothing happened.

23 Q He's just finished putting the salad in these
24 little salad bowls and you say he then started to reach
25 down to get two more, right?

1 els Milton-cross

2 his hand near it.

3 Q Was he still holding on to the salad bowl with
4 his left hand?

5 A That's right.

6 Q As he bent over?

7 A He didn't have to bend that far if he was stand-
8 ing at that cabinet, from the top knob.

9 Q Are you sure that his hand came off the spoon
10 before he started to slide or after he started to slide?

11 A The spoon?

12 Q Yes.

13 A He didn't have the spoon in his hand. The spoon
14 was in the bowl. He was reaching for the cabinet.
15 He couldn't have opened the cabinet with the spoon.

16 Q Did he start to slide before he put the spoon
17 down or after?

18 A After.

19 Q He filled all the six little salad bowls before
20 you started to talk to him?

21 A He had filled the six.

22 Q How long did that take him?

23 A Say about three or four minutes.

24 Q Was the ship rolling at that time?

25 A Small amount.

1 els

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2 Q It was pretty calm?

3 THE COURT: He said a small amount.

4 Q I am talking, was it rough or was it calm,
5 that is what I want to know? I am not a seaman. Was
6 it rough or was it calm?

7 A It was bad weather all the way but the ship
8 wasn't in a big roll?

9 Q He was the only one standing at that time?

10 A He was the only one standing.

11 Q What was the other messman doing?

12 A Sitting down.

13 Q Did he have work to do at that time?

14 A In that kind of weather, only the salads, that's
15 all.

16 Q You say because of the weather the other messman
17 was doing nothing?

18 A He had set up everything. Wasn't nothing to
19 be drawn of the storeroom or nothing.

20 Q I was asking you, what was the other messman
21 doing while Koa was working On the salad?

22 A Sitting down.

23 Q Because he had no work to do?

24 A Not until 5 o'clock.

25 Q You say that you told Koa to stop working?

1 els

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2 A I told him to sit down.

3 Q When?

4 A After he had filled the six salad dishes.

5 Q And the ship was not rolling much at that time,
6 was it?

7 A Not much.

8 Q But you let him work while he was filling the six
9 and it wasn't rolling much and you say you then told him to
10 sit down?

11 A That's right.

12 Q Do you know whether he heard you?

13 A I'm positive because I was talking loud enough.

14 Q Do you know whether he heard you?

15 A He said he wanted to make two more salads.

16 Q Was there any reason for making two more salads,
17 to your knowledge, on that ship on that day?

18 A I don't know. He wanted two more, so --

19 Q Was there any reason that you knew of that a
20 messman at that point would want to make two more salads?

21 A Well, I don't know.

22 Q There was no reason, was there?

23 A That is why I told him to leave it alone and
24 sit down.

25 Q But there was no reason, was there?

1 els

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2 A No.

3 Q To make two more?

4 A That's right.

5 Q Did you tell him not to make two more?

6 A I told him to sit down, leave it alone, that's
7 enough.

8 Q And do you know whether he heard you?

9 THE COURT: Sustained. It's repetitious.

10 Q Are you telling us that he disobeyed your order
11 to sit down? Is that what you are telling us?

12 A That is the only way it looked, because --

13 Q You are telling us, then, that he disobeyed an
14 order?

15 A If he had to sit down, he'd have obeyed the order,
16 so he had to disobey.

17 Q Is there a procedure on a vessel where a seaman
18 disobeys an order?

19 MR. CARR: Object to the form of the question.

20 MR. ZELENKO: I haven't finished the question.

21 MR. CARR: Sorry.

22 Q And in which something is marked down in the
23 ship's log that the man disobeyed an order?

24 A Yes.

25 Q Is there such a procedure?

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1 A There is such a procedure. But who would go
2
3 through a procedure like that for a small thing like that?

4 Q You mean the fact that he was hurt was a small
5 thing to you?

6 A I mean the food --

7 THE COURT: Wait a minute.

8 Mr. Zelenko, that is not justified by his answer.

9 MR. ZELENKO: I withdraw that, Judge. I'm
10 sorry.

11 THE COURT: After all, he is a witness. He came
12 here. He works as a seaman. He is not being sued here
13 or anything else.

14 MR. ZELENKO: I understand that, your Honor.

15 THE COURT: I know, but the context in which you
16 asked it -- you have withdrawn it.

17 All right.

18 Q What do you mean, it was a small thing?

19 A Before he got hurt it was a small thing.

20 Q But according to you, he disobeyed you and he
21 got hurt; isn't that right?

22 A That's right.

23 Q That became a big thing, didn't it?

24 A Became a big thing then.

25 Q You didn't log him for disobeying an order, did

1 els

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2 you?

3 A I did not.

4 Q You are responsible for the safety of the men
5 under you, aren't you?

6 A That's right.

7 Q And if someone gets hurt while working under you
8 you have to find out the reasons why and worry about safety
9 procedures and things like that, isn't that right?

10 A That's right.

11 Q Koa was working at the salad table in compara-
12 tively rough weather; not the big roll, but comparatively
13 rough weather. You didn't tell him to sit down when he
14 started to do the job, did you?

15 A No.

16 Q And you didn't tell him to sit down as he went
17 on to fix those six salad plates, did you?

18 A The six was all they needed.

19 Q You wanted to get that part of the job done,
20 didn't you?

21 A That job wasn't necessary. But as he started,
22 I just let him go on and fill the six.

23 Q You mean as long as he started you didn't see
24 any reason to tell him to sit down, even though the weather
25 was pretty rough?

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1 A At that time the ship wasn't shaking or rolling.

2 Q But you saw the man standing there doing this
3 in rough weather and you didn't see fit to sit him down
4 or tell him to sit down until after he finished those
5 six bowls; is that right?

6 A Once he had started I just let him went on.

7 Q You mean no matter how rough it got, as long he
8 started it you wanted him to finish the six bowls?

9 A He didn't have to finish them. In fact, he
10 didn't have to put any in there.

11 Q Why didn't you go over to him and tell him to
12 sit down?

13 A I could hear from what he was setting --

14 Q If he didn't do it, you couldn't go over to
15 him and say look, Koa, the weather is rough, I want you to
16 sit down and not fill any salad bowls?

17 A No, I didn't do that.

18 Q You saw him do it, you saw him start the job?

19 A That's right.

20 Q And the weather was rough enough that you had
21 to put the big salad bowl in that little cabinet you were
22 telling us about?

23 A That's right.

24 MR. CARR: I think he said breadbox.
25

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2 THE WITNESS: Breadbox.

3 Q It was rough enough for it to be put in the
4 breadbox before he started to work on it?

5 A That's right.

6 Q And that was because you wanted to make sure
7 that the six men who were going on watch would have their
8 salads; isn't that right?

9 THE COURT: He says no. That was the plain-
10 tiff's idea. As far as he was concerned he didn't have
11 to put them out at all. If they wanted salad they'd go
12 over to the cabinet and take it out themselves. That is
13 what he testified to and that is what he has been saying
14 all along.

15 Q You say, then, that Mr. Koa on his own, despite
16 your orders, went over and did his usual job?

17 THE COURT: Now ait a minute.

18 A I had given no order --

19 THE COURT: Wait a minute. There is no basis
20 in the testimony up to this point for that question.

21 Sustained.

22 MP. ZELENKO: I respectfully ask that I may be
23 permitted to ask that question.

24 THE COURT: You may respectfully ask and I
25 respectfully decline, because you may not ask something

1 els

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2 that is not in the evidence and which has not been adopted
3 by this witness. He's made it very clear what his
4 position was here.

5 Q Before this incident did you have any trouble
6 with Mr. Koa obeying your orders?

7 A None at all.

8 Q And he always obeyed them, didn't he?

9 A That's right.

10 Q Do you know of any time when he resented your
11 orders?

12 A None at all.

13 Q He willingly did whatever you told him to do?

14 A That's right.

15 Q All through this voyage?

16 A All through the voyage.

17 Q You say this was the only time that he didn't
18 obey you?

19 A That's right.

20 Q Were there any handholds or any devices on the
21 salad table or near the salad table for a man to hold on to
22 in case of rough weather while he was working at the salad
23 table?

24 A None.

25 Q Was there any mat underneath the salad table

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2 for a man to stand on while he was working?

3 A No. We couldn't put a mat there because some-
4 body might trip over it.

5 Q Did you ever try to put a mat there?

6 A We never did.

7 Q There were times, weren't there, when water
8 could come over there before it was mopped up?

9 MR. CARR: Objection.

10 THE COURT: That was one thing which I was
11 wondering whether anybody was ever going to ask.

12 What was the distance between this water fountain
13 and where he was standing, because it seems to me from those
14 photographs it's some distance.

15 MR. ZELENKO: I will adopt his Honor's question.

16 Q How far from that salad table was this water
17 fountain?

18 A Well, I'd say from here to over there.

19 Q This railing?

20 A That's right.

21 MR. ZELENKO: Would you say that is about 12
22 feet?

23 THE COURT: About 12 feet.

24 MR. CARR: 12 or 15.

25 THE COURT: 12 to 15. The jury sees it and they

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have their own impressions.

Q Did you have any mats under the water fountain?

A No.

Q Were there times in rough weather when water would come out of the water fountain after it was used?

A If it was being used sometimes water would spill if the ship rolled. But it was the duty of the messman to mop it up if they were working. If they were not working and nobody mopped it up before, they would mop it up when they come to work.

Q But there were times in rough weather when water came out of the fountain?

A Right. Or possibly when somebody was using it.

THE COURT: On any occasion that you saw water come out of the fountain would it ever land by the table where he was working?

THE WITNESS: It would always land over to the side, it would go that far.

THE COURT: Did it ever go 12 to 15 feet over to where this table was?

THE WITNESS: It wouldn't go over to there unless the ship was listing to that side.

THE COURT: Did you ever see that condition?

THE WITNESS: I never saw it. I saw the ship

1 cls

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2 A The salad bowl, you could just reach over from
3 there to here. But this is a glass rack. On rough
4 days this rack is not there. It's in the cabinet.
5 That is why he brought the salad bowl over there.

6 MR. ZELENKO: If your Honor please, I may just
7 point out one thing. When the plaintiff put the K there,
8 he was indicating the table he worked at. The question
9 wasn't that he was standing exactly there.

10 THE COURT: He is just amplifying so the jury
11 can understand the picture better.

12 Is there anything that is not there on rough
13 days?

14 THE WITNESS: This glass rack.

15 THE COURT: Show the jury what you are talking
16 about. Put a circle around it. You say that is not
17 there on rough days, and that is where he was working.

18 THE WITNESS: That is not there.

19 (Witness marks.)

20 Q You say the job that Mr. Koa was performing that
21 afternoon was not a necessary job?

22 A It wasn't necessary.

23 Q And you state that because of the weather
24 conditions that existed that day?

25 A Because of the weather conditions, when it's

1 els

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2 rough like that, we leave the salad in the breadbox in the
3 bowl with a few dishes out there. Anyone wanting a salad
4 will come by and scoop it up himself.

5 Q At any time either before or after this accident
6 did Mr. Koa mention anything to you about water being on
7 the deck?

8 A Not to me. Not at all.

9 Q Was the report of personal injury prepared by
10 the purser aboard the ship?

11 A It was prepared by the purser.

12 Q I show you this document that has been marked
13 as Defendant's Exhibit A.

14 A This statement was prepared after Mr. Koa had
15 been sent to the doctor in Yokohama, Japan.

16 Q Did you sign this particular report after it was
17 prepared?

18 A I signed it after Mr. Koa had signed it.
19 I signed it down there.

20 MR. ZELENKO: If your Honor please, do they claim
21 that is the original or is that supposed to be a copy, or
22 what?

23 THE WITNESS: That is a carbon copy, it's the
24 third copy.

25 THE COURT: Therefore, in the sense that it is

1 els Milton-redirect
2 the original, it is a third copy of the original; is
3 that your testimony?

4 THE WITNESS: Yes, sir.

5 Q Mr. Milton, when you signed this particular
6 document was Mr. Koa's signature on the document?

7 A His signature was clear on the first document
8 on the top.

9 MR. ZELENKO: If your Honor please, that is
10 objected to. We are talking about this document and the
11 witness is now talking about something that I cannot cross-
12 examine him on.

13 THE COURT: You see, we don't forget what happen-
14 ed in the past here. There was a statement made by you
15 that you got a document which doesn't have the signature
16 on here. He is entitled to show you how it happened.
17 He says on the original document the signature is clear,
18 but as you go through the carbon copies it doesn't show
19 through.

20 MR. ZELENKO: I most respectfully object to the
21 introduction of that document.

22 THE COURT: He didn't introduce it.

23 MR. ZELENKO: I submit that this witness cannot
24 testify to something that is not in evidence about which he
25 cannot be cross-examined.

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2 THE COURT: You will look at it. He's got it
3 right there. He is laying a foundation for the purpose
4 of introducing this to explain to the jury why if this
5 issue comes up the signature isn't there on your copy.
6 That is as I understand the offer of proof. If that is
7 the purpose of it, I allow it.

8 MR. ZELENKO: I respectfully object, your Honor.

9 Q In addition to yourself and Mr. Koa did anybody
10 else sign this document?

11 A After Mr. Koa signed it I signed it, then the
12 captain signed it.

13 Q Is this the captain's signature that appears
14 here?

15 A That's the captain's signature.

16 THE COURT: Do I understand your testimony
17 that when you saw this document originally there were three
18 parts to it?

19 THE WITNESS: Three parts.

20 THE COURT: The original, which was on top, and
21 the other two underneath: is that right?

22 THE WITNESS: Underneath it.

23 THE COURT: And between them there was carbon
24 paper.

25 THE WITNESS: Carbon paper.

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2 Q Did M--. Koa's signature appear on the top copy?

3 A It appeared on the top copy. I only sign after
4 the person signs, that is involved in the accident.

5 Q Is this a document that the purser prepares
6 whenever an accident takes place on a ship?

7 A After he has sent the person to the doctor, then
8 he makes up this form.

9 MR. CARR: I'd like to offer this in evidence,
10 your Honor.

11 MR. ZELENKO: This witness didn't make up this
12 document, Judge.

13 THE COURT: No, I am not going to accept it at
14 this time because you have made no issue of it except to
15 make an oral statement which you don't know under oath
16 and which doesn't bind anybody. You have made some
17 remark that on your copy it doesn't appear.

18 MR. ZELENKO: I have another objection --

19 THE COURT: That is sufficient. The jury is
20 directed to disregard all this stuff about this document.
21 He says there is not a signature on this document. That
22 is not under oath. In light of there being no testimony
23 at this time in the record as to what this document contains,
24 I am going to sustain the objection.

25 Q Did this document contain a statement from Mr.

1 els Milton-redirect
2 Koa as to how his accident took place?

3 MR. ZELENKO: I object. If it is not in evi-
4 dence I object to any statement as to what the document
5 contains.

6 THE COURT: He is allowed to show as laying a
7 foundation for the purpose of attempting to introduce it
8 in evidence. I don't know whether he will be able to
9 do it, but he has a right to try it.

10 Read the question.

11 (Question read.)

12 A It is the statement on there from Mr. Koa.
13 It has to be, before Mr. Koa can sign it.

14 Q Do you see that statement on this document?

15 A This is the statement here.

16 MR. CAPR: The witness is indicating a statement
17 that appears in the fourth box.

18 Q Was it under that statement that Mr. Koa's
19 signature appeared?

20 A Under that statement.

21 THE COURT: Do you know Mr. Koa's handwriting
22 when you see it?

23 THE WITNESS: I know it.

24 THE COURT: Do you have to see it from time to
25 time when he writes his name?

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2 THE WITNESS: See, each week they have to write
3 their overtime. When they write their overtime then the
4 delegate brings it to me and I type it out.

5 THE COURT: Then he signs it?

6 THE WITNESS: He signs his slip. He has to
7 write the name on his overtime slips.

8 THE COURT: I just want to know whether you
9 have seen him write his name.

10 THE WITNESS: I have seen it.

11 THE COURT: Is it your present opinion that the
12 signature on there was made by him?

13 THE WITNESS: It was made by him.

14 MR. CARR: I offer it in evidence, your Honor.

15 MR. ZELENKO: Did this witness testify that he
16 typed out the paper?

17 THE COURT: No.

18 MR. ZELENKO: Then I renew my objection.

19 THE COURT: Overruled. He has now testified
20 that he recognizes the signature of the man and that is the
21 signature of the man and it said something that he is
22 supposed to have said. Under the circumstances I will
23 allow it. Not as a business document or anything else,
24 but as a piece of paper on which he signed his name and
25 there is a statement appended thereto, to which his name

1 els

Milton-redirect

291

2 is signed.

3 (Defendant's Exhibit A was received in
4 evidence.)

5 MR. CARR: It is admitted for the limited
6 purpose --

7 THE COURT: The limited purpose only of what he
8 himself signed. Nothing on there binds this plaintiff in
9 any way whatsoever. Only what he himself signed.

10 MR. CARR: May I read it to the jury, your
11 Honor?

12 THE COURT: Yes, you may. It is in evidence.

13 MR. CARR: "Ship took sharp roll throwing me
14 to galley window into the crew pantry."

15 18 January 1971.

16 I have no further questions.

17 * * *

18 RECROSS EXAMINATION

19 BY MR. ZELENKO:

20 Q I am going to ask you to look at this Exhibit A,
21 Mr. Milton, and ask you whether or not your signature and
22 that of the master's appears so you can read it?

23 A It does.

24 Q I ask you to look where Mr. Koa was supposed to
25 have signed. Is that just as clear as your signature?

A It is not as clear because a lot of people don't

1 els

Milton-recross

294

2 * * *

(Pause.)

3 Q Mr. Milton, Mr. Carr just asked you whether the
4 job that Mr. Koa was doing was necessary, and you said it
5 wasn't necessary. Is that what you just told him?

6 A I said it wasn't necessary that he had to dish
7 out the salads.

8 Q You just said it was not a necessary job?

9 A No.

10 Q Right?

11 A That's right.

12 Q And yet, as you sat there and you saw him dishing
13 the salads out in that weather, you let him go ahead, didn't
14 you?

15 A That's right.

16 MR. ZELENKO: No further questions.

17 THE COURT: All right, Mr. Milton, thank you.

18 (Witness excused.)

19 MR. CARR: The defendant rests, your Honor.

20 MR. ZELENKO: If your Honor please, at this time
21 I would like to offer into evidence a copy --

22 THE COURT: Wait a minute.

23 Defendant rests. Plaintiff's rebuttal.

24 MR. ZELENKO: I would like to offer into evidence
25 a copy of the exhibit that I was served with. That is,

* * *

1 els
2 * * *

218a-220a

3 this man did not lose an hour of duty time?

4 THE COURT: No, that is the damages. I don't
5 see any need for that. We will go into that if there
6 is a recovery here.

7 MR. ZELENKO: In view of the testimony of this
8 witness I was going to get the plaintiff back on the stand
9 and deny that he heard the steward tell him anything.
10 But to do that I would have to have and I have already
11 called our interpreter, I can't get her here this afternoon.
12 I can have her the first thing in the morning. Unless
13 Mr. Carr will concede, without conceding the truth of it,
14 if that the plaintiff took the stand again he would deny
15 that he heard the steward.

16 THE COURT: I was under the impression that he
17 did deny it.

18 MR. CARR: He already has. I will so stipulate,
19 that if he resumed the stand he would testify that he did
20 not hear the steward.

21 THE COURT: All right.

22 (End of side bar conference.)

23 THE COURT: There are two things that resulted
24 from our consultation here. We essentially discussed a
25 matter of law which, of course, as I explained to you before
we don't discuss in your presence usually, although we have

* * *

EXCERPTS FROM PLAINTIFF'S SUMMATION

221a

1 elh52

2 ***

3 to mop. What does Koa say took place at that time after the
4 three or four minutes while he is working? If you have
5 an opportunity, you go in the jury room, get ahold of your
6 watch and spend three or four minutes. I am going to make
7 it three minutes, not five, as they said. And see how long
8 he was working while the ship was rolling in the rough
9 weather. And the two superiors sitting there, obviously
10 interested in the man doing his work. And what else could
11 he do? He had to do his work. Those were his orders.
12 And he says then the ship gave an extra roll. I was holding
13 the bowl in my hand, ladling with the left, and water came
14 under my knees. I fell down right there and slid across
15 the room into the pantry room and dropped the bowl. When
16 I got up my pants were wet.

17 Milton said he didn't feel his pants. We are not
18 talking about puddles and we are not talking of slush.
19 We are talking of taking this extra heavy roll and he said
20 it was wet and he slid across the room. And I submit to
21 you, wet or dry, they had him working in an unsafe place
22 and in an unsafe condition at that time. Those three or
23 four or five minutes, and they wanted that work done
24 otherwise they would have said sit down and don't work.
25 Not like Milton said. First he filled the six, and then
I told him, and he said he wanted to do two more. That was

1 elh56

2 ***

3 you don't notice it. "Have you ever seen water from time
4 to time on the deck?"

5 "A Every time they drink there. "Q It is difficult
6 to see the water unless you are looking for it because
7 of the color of the tile? Answer: If that deck is
8 wet, if you look for it, you can see it."

9 Now, Milton told you what they were supposed
10 to do. Mop the deck and do a lot of things. But did they
11 do it? Could this accident have happened unless it happened
12 the way Koa told you? Of course, after the accident these
13 people who wanted to make things crystal clear and now
14 want to do some cover up. So what happens? Well, he is
15 supposed to be a friend of the cooks', and he went ashore
16 with him, but he went ashore to see doctors too. And then
17 the ship lands. Right on board come two investigators from
18 the company. And a lawyer. And this man, who was an
19 investigator at the time. He comes in there, and he comes
20 right up to Koa. Let's be practical about it. Is he there
21 to do Koa any good? As Mr. Carr said, let's be fair about
22 things. Let's be fair about things. Is he there to be
23 fair to Koa? Is he there to get an exact version of what
24 happened? Or is he there to protect the company against
25 any possible claim, because the only claim that a seaman
like Mr. Koa can make is in the federal court here. This

1 elh57

2 isn't a compensation case, this is it. Either he proves
3 his claim, and this is his burden, he's got to go through
4 this. And as the judge told you in the beginning, seamen
5 are wards of the court. They get protection in the
6 federal court. This is what he's got to go through. You
7 saw Koa. You heard Koa. You saw his brother. And there
8 he is, he is injured, the ship lands, he's been to two
9 or three doctors, he is waiting to get off, and this man
10 comes up. Do you see questions and answers here? No.
11 He reduced it to writing. Sure, he's got the name and he's
12 got the date because they got that from the medical log.
13 That is what he says, that is where they start with, the
14 medical log. They just want to protect this company.
15 And you can bet on that. You don't have to know anything
16 about maritime law. You know why these investigators are
17 there. And then "I was walking in the messroom." Now,
18 look, nobody, even these two men say that Koa was walking
19 in the messroom. He was standing. Of course they tried
20 to explain it by language difficulty.

21 Now, I never heard anything like that. Mr.
22 Anduiza has a second language, some of us have other
23 languages too. But that doesn't make it easier to communicate
24 with somebody who doesn't speak the language that you do.
25 This fellow is of Chinese extraction, and so is his brother

1 elh58
2 who works in a kitchen too someplace . And he lives in
3 New York. And if they were so anxious to get everything
4 down it would have been easy. While he gets home. Have
5 somebody up who can talk his dialect and find out what's
6 what. No. They wanted to get it down and they wanted to
7 make sure that that deck was dry and clean. "And I fell
8 because." Do you believe that Koa read that over before
9 he signed it? Do you believe he was able to? I don't think
10 you will. Put yourself in the position on that ship
11 on March 15th, and I think you are going to find out.
12 You know, there is another little thing that comes out
13 about what happens in thesesituations. The cook, Feley,
14 when I asked him in a deposition, what did you remember
15 about this, and he said, "What did you remember about
16 this accident to Mr. Koa from the date it happened until
17 the time that this man came to take your statement on
18 the day that you signed your name? Did you remember your
19 accident, did you keep it in your mind? I don't keep nothing
20 in my mind but it comes to my mind when he told me about
21 the fellow getting hurt on the ship. Then it came back
22 to you? Answer: Yes."

23 What do you think an investigator is doing up on
24 the ship talking to the cook and talking to Koa? Is he
25 out to help anybody but the company? He is experienced.

1 elh59

2 He knows what's going to make a difference in a courtroom
3 maybe later on. Where does he get this statement? Does
4 he give Mr. Koa a copy of it? He said no, just had him
5 sign underneath. Picture the circumstances. Is that fair
6 or was it taking advantage of a poor simple soul who just
7 about knows enough to write his address and his name and
8 they try to make a big English scholar out of him. He knows
9 what the menu was. How many times have you gone into
10 restaurants with ethnic backgrounds, Chinese or otherwise,
11 and the waiter can just about tell you what's on the menu.
12 That is what Koa did. Why didn't they give him a copy of
13 this? Wouldn't that be fair? Take it home with you, it is
14 what you signed. "I read it to my brother." Neither of
15 them could read this. Both of them said it wasn't read to
16 us. They trusted him. They wanted to get off the ship.
17 Don't forget, this wasn't a stranger coming from the
18 outside. This was somebody from the company. Their
19 employer you have to understand the type of person Koa
20 is and his brother. Koa is working for a big company
21 and he's got a job and somebody comes in from the company
22 and he signs his name because the company tells him to.
23 He trusts them. But is the claim that he was in there.
24 Where is this little statement here that neither Mr.
25 Miller saw signed, but Koa's name is on there. Ship took

1 elh60

2 sharp roll throwing me to galley window into crew pantry.
3 That is part of the story. You don't see the whole story
4 in here. Not the way it came out in the courtroom. You
5 don't see anything here about Koa mixing salads. Oh, no.
6 And where is the person that drew it up? Milton says,
7 I didn't draw it up, I don't know whether his name was on
8 it before the typewriting or after the typewriting. And
9 this is supposed to show you that this is all that took
10 place. You know what part of the truth is? Yes, that did
11 take place, but that is part of the story. They knew at
12 that time what had happened, that Koa was working and
13 he was dishing salads. Did he contribute in any way to
14 the happening of this accident? A lot of talk of this.
15 Why, he should have known better. He shouldn't have been
16 standing there. He should have been here, he should have
17 stopped. Now let's look. The weather is rough for two days.
18 And nobody complained that he didn't do his regular work
19 in those two days. It is only now that the company is
20 complaining, because he had an accident. But can you picture
21 him in those two days before that, rough weather for
22 two days. Nobody says that they had him stop working. This
23 was a heavy storm. What about breakfast that morning?
24 What about dinner the night before? Obviously he was doing
25 his work. Nobody has come in here, there is no testimony

* * *

1 think the facts are with him. Did he have an accident?
2 Yes. Did he have an accident while he was working? Yes.
3 What was he doing at the time of the accident? Ladling out
4 the salad. Everybody agrees. But then they all take off
5 in different directions. But that is the company. That
6 is the investigator. These are the reports of the accident.
7 These are the people who are interested. It is their job
8 to be, to protect the company not to protect Koa. I am trying
9 to protect Koa. Maybe I am not doing it too well. But I ask
10 you in in what your job is, to protect Koa because I think
11 he's proved his case as best he could. He can't bring
12 witnesses. Who does he know on that ship? They say about
13 we didn't bring any witnesses, they could have brought
14 them too. Nobody says those witnesses were under our
15 control. Don't be fooled by this business that this
16 was Koa's job to mop the floor. Koa said it was the other
17 man's job to mop that floor, but in any event, the boss
18 was there. And we don't exaggerate by saying there was
19 puddles of water. The ship took a roll and down he went,
20 for the first time in two days in rough weather and we
21 don't know how many other days in rough weather, and off
22 he went. What could have thrown him? Yes, as he said, the
23 roll of the ship and the water. But you have this other
24 thing that I say, this other area in the ship. Before the
25

elh67

1 ship rolled, before this act of God, as Mr. Carr pointed
2 out, before that took place, ran this period of three or
3 four minutes when they expected him to do his job filling
4 the little salad bowls. And the Lord wasn't in it at that
5 time. And they permitted him and expected him to work. Why?
6 Because as Milton said, six men were supposed to be served.
7 That is how Milton knew it was six. And the intervening
8 act of God had nothing to do with placing him in this place
9 of danger because if they hadn't expected him to do his
10 work, if he hadn't been expected to do his work, if he
11 hadn't known that his boss wanted him to do his work they
12 would have had him away from that table the minute he
13 picked up the salad bowl and said look, Koa, or Chong, or
14 whatever this fellow called him, sit down. There will be
15 no work on your part at all. Don't forget, Koa was working
16 before. And they let him work. Then there would be no act
17 of God. That would have nothing to do with it. But you have
18 something to do with it, and I ask you to protect him
19 under the areas of your work here. Because he's got
20 sufficient burden to assert his rights. And I say that
21 under the circumstances he's proved his case. And I ask
22 you to go along with us. Thank you.

* * *

EXCERPTS FROM CHARGE OF THE COURT

229a

1 elh71

2 ***

3 I assume there is no question about it being operated by
4 the defendant in this case. So all those legal things
5 as far as that is concerned, there is no question about
6 it.

7 If anybody employed by the ship by way of being
8 a steward, a cook, or anybody else, did or caused anything
9 to be done which caused injury to this plaintiff, this
10 defendant is responsible for it. There is no question
11 about it.

12 There are areas of serious disagreement, however,
13 and the areas of disagreement have been pointed out to you
14 in the remarks made by counsel. They have told their
15 positions to you and in many areas they are in complete
16 disagreement. Of course, what they said is not evidence.
17 The evidence came from the witness stand. Anything that
18 I say about the facts is not evidence either. I don't
19 intend to discuss the facts at any great length. As a
20 matter of fact, last night I did set down what I remembered
21 to be the contentions of both parties, but the way it
22 has worked out and the admirable fashion in which both
23 lawyers have covered their contentions, I am going into very
24 little of that in my remarks because you have just heard it.

25 You have heard what their contentions are and
there is no need for me to reiterate them. On the questions

1 elh78

2 ***

3 of testimony, rather, evidence, of this immigration law
4 and the fact that when you do apply for citizenship you
5 are supposed to be able to read simple English phrases,
6 and so forth, and to write some. This generally comprises
7 evidence in that category, as I indicated, those five
8 categories.

9 What is not evidence, because since you must
10 consider this case on the evidence as you heard it here
11 in the courtroom, you must take out of your minds things
12 that are not evidence. The comments between the lawyers;
13 comments of the court and the lawyers; anything that was
14 said between the parties, and some things were said where
15 they gave personal knowledge of something. That is not
16 evidence in the case.

17 Neither of us was sworn; neither the lawyers
18 nor the court. So anything we said in this case isn't
19 evidence at all and you are to disregard it as far as being
20 evidence is concerned.

21 A question is not evidence either. The one
22 form of question which I indicated to you that this
23 proposition occurred during the trial and the example I
24 used was where if a witness is asked, "When did you stop
25 beating your wife," and there is an objection and there
is no answer, you cannot assume that because it is in the

1 elh80

2 ***

3 did not allow it for the fact that he made an observation
4 that that was the fact. That is not in the case.

5 They chose to argue from that, but I tell you
6 now, there is no evidence in this case that this man
7 was reckless or any other description that was used. This
8 was only allowed for the purpose of refreshing the witness'
9 recollection as to why he remembered the incident and how
10 he was able to give a statement. That is the only reason.

11 Having described to you the tools used by both
12 sides to present their arguments, namely, evidence and
13 what is evidence and what is not evidence, we will get to
14 the point now of how do you evaluate the evidence; how do
15 you come to see where the truth lies in this case.

16 The first thing that jurors usually do and have
17 done under our system is to observe the demeanor of the
18 witness; how he's testified; how he answered the question;
19 how his answers conform to the rest of the evidence that
20 is in the case which you have already accepted.

21 It's like doing a jigsaw puzzle; you fit in parts.
22 The fact that this man had to testify through an interpreter
23 must not prejudice him. The fact that he is oriental must
24 not prejudice him. Our law is equal to all people. It
25 doesn't see color; doesn't see faces. It sees rights.
That is what we see. If you have a right, you are entitled

1 elh81

2 to it. If you haven't got it, you are not entitled to it.

3 It doesn't make any difference what your color,
4 what your form of speech is, what your dress is, or any-
5 thing else. So that in observing the witness you don't
6 observe him for that reason. You observe him for other
7 reasons. Just like when someone comes and wants to sell
8 something to you or you want to buy something. You use that
9 same fine discernment in using your judgment as to what
10 these witnesses say here as you do in making decisions
11 in matters of life important to you.

12 One of the things you shouldn't do is to leave
13 your common sense outside the jury room. You bring your
14 common sense with you. And one of the lawyers alluded to
15 that. It's very well in argument, for example, to say well,
16 now, this fellow went up there to take a statement from you.
17 do you think he went up there to protect the defendant?
18 He was not obliged to go up there to protect the defendant.
19 He was obliged by the company to go there and make an
20 investigation. Is there anything sinister or nefarious
21 about a company trying to protect its rights in getting
22 statements after the accident happened when the memories
23 are fresh so that they can have accounts of it?

24 You would assume from that that everyone is
25 a crook and he is going to go up there to get a statement

1 elh82

2 to trip him up so he can hurt him in some way. Sailors
3 sail on these ships all the time and they sail on them
4 from year to year, and the company needs sailors as much
5 as the sailors need the company. Do you think a company
6 would last very much in business if they went around
7 taking statements from people and in effect putting them
8 out of court if they had a proper claim. I suppose it
b5 9 could happen, I don't know.

10 Mr. Zelenko argues that this man went there for
11 the ship and therefore something happened. Well, the only
12 thing I suggest happened is this, that in giving, looking
13 into this man's testimony you must look into his interest,
14 the interest of every witness in this case including the
15 steward and the cook and everybody else who is employed
16 by the company; you must know that they are employed by
17 the company, and consider that. And you must consider
18 the totality of the evidence and determine whether or not
19 there is something in there that will assist you in arriving
20 at the truth.

21 On the other side of the coin, Anduiza, he was
22 an investigator, he has since become a lawyer. Well, this
23 is a fact for you to consider, whether a fellow who's
24 got a career to go on and is now presently a lawyer is
25 going to go around and do his kind of thing, put words

1
2 into mouths of somebody who never said that at all. These
3 are judgments for you to make.

4 Mr. Carr suggests that the plaintiff here gave
5 a lot of versions of this thing and, therefore, there must
6 be something wrong here because all he is trying to do is
7 cover up here and try to come out at a point in time when
8 he's got a good lawsuit by way of his statement and his
9 testimony.

10 Well, here again it is up to you to determine
11 this. The interest of every witness in the case, including
12 the plaintiff, is of interest to you in evaluating the
13 testimony. You look into the background of each of the
14 witnesses, determine what their position is, and then
15 based upon your analysis of it, you come to a judgment
16 as to how much you believe and what you believe.

17 Of course, the cook and the steward are fellow
18 employees of the plaintiff. They come out of the same union
19 hall. So that you consider their interest as company
20 employees and also their interest as fellow colleagues
21 who work with him.

22 There's been no showing here that I am aware
23 of that there were any fights between any of these witnesses
24 and this plaintiff. There is some evidence they went for
25 a beer one time when he went to get medical treatment and

1 elh84

2 during that time they went for a beer. What I am suggesting
3 to you is that you use your common sense and you look into
4 all the facts and background of the case and you determine
5 from that what their interest is and then make a judgment
6 as to where the truth lies and how much of it you will
7 accept. There is this to be said about describing things
8 as lies. It isn't black and white like that, because to
9 lie means that you have made a deliberate effort to do
10 something. Sometimes what happens is, and I think we are
11 all aware of it, is what they describe as pathological lies.
12 They are not actually lies at all. What they are is, some-
13 body convinces himself that something happened after the
14 event and says gee, it must have been that way, and it turns
15 out it wasn't that way. That is not a deliberate lie. You
16 will examine this testimony and find out for your own mind
17 from the testimony the totality of the evidence where the
18 truth lies in this case and what witnesses you are going
19 to believe. That is your main and principal function in the
20 case and that is what you are here to do today.

21 If you find that any witness, including the
22 plaintiff, because he is also a witness, has falsely testi-
23 fied to any material fact you must disregard that portion
24 of it which you believe to be false, and you may disregard
25 his entire testimony. That is a judgment for you to make.

1 elh85

2 There are some statements here which cannot be reconciled
3 if they are made by one person, and these have been brought
4 to your attention by the lawyers as they cross-examined
5 these witnesses.

6 If you find that a witness has said one thing
7 at one time and another thing at another time it's up to
8 you to make a judgment based upon that, based on all the
9 evidence, plus the fact as to where the truth lies in that
10 particular area. So you will remember and consider those
11 in making your judgment.

12 Having described to you the various propositions
13 in those first two sentences I gave you, I am now going
14 to define and explain to you what unseaworthiness is and
15 what is involved in this case.

16 The mere happening of an accident in and of
17 itself does not establish that the ship was unseaworthy.
18 Proof must be adduced in that regard. Unseaworthiness
19 under the maritime law requires that the ship owner, and
20 in this case the defendant, owes to every member of the
21 crew employed aboard the ship a duty to keep and maintain
22 the ship and all the decks, passageways and equipment
23 in a seaworthy condition at all times. The particular
24 area we are concerned with here, of course, is the messroom.

25 To be seaworthy means to be in a condition reasonably

1 elh86

2 suitable and fit so that it may be used for the purpose
3 for which it is intended. And in this case, of course,
4 we are always in the messroom. That is the only area we
5 are talking about of the ship.

6 Some of you may think that when we are talking
7 about seaworthiness, and so forth, it's got something to
8 do with the ability of the ship to sail and not to sink,
9 and so forth. It goes further than that. As I indicated
10 to you, the ship must be in such condition as is reasonably
11 fit for the intended purpose.

12 An unseaworthy condition may result if the
13 sailor is not provided a safe and reasonable place to work.
14 So that essentially that is the claim of the messman here.
15 of this plaintiff. He claims that this area in which
16 he was working and what he was doing at the time and the
17 happenings at or about the time that this occurred created
18 a condition which was unsafe and, therefore, as a result
19 of that he was injured.

20 When I was selecting you as jurors I talked
21 to you about the negligence **aspect as that time.** That
22 has been disposed of, and the fact that it has been disposed
23 of is not to the detriment or benefit of either side here.
24 What we are deciding now is one phase of this case. The
25 fact that the court took action on that is a matter of law

1 elh87

2 and has nothing to do with this area.

3 However, in this area here, the unseaworthiness,
4 this does not depend upon any negligence or fault on the
5 part of the ship owner, because it doesn't make any difference
6 whether he was negligent or not. The ship owner is liable
7 for consequent damages proximately caused by an unseaworthy
8 condition existing at the time and place, even though
9 he may have exercised due care and he may not have even
10 had notice of the condition. If in fact the ship is un-
11 seaworthy, that is a fact upon which the plaintiff can get
12 a recovery, whether the ship owner knows it or not.

13 An injury is proximately caused by an act or
14 failure to act whenever it appears from the evidence that
15 the act or omission played a substantial part in bringing
16 about or actually causing the injury and that the injury
17 was either a direct result or a reasonably probable con-
18 sequence of the act or omission.

19 The ship had a continuing duty to supply a safe
20 place to work. The ship was at the time and place here
21 involved, obliged to furnish the sailor with a reasonably
22 safe place in which to work and to use ordinary care under
23 the circumstances to maintain the place of work in a
24 reasonably safe condition.

25 This does not mean that the ship is a guarantor

1 elh88

2 or an insurer of the safety of the place to work; the
3 extent of the ship's duty is to exercise ordinary care
4 under the circumstances to see that the place in which
5 the work is being performed is a reasonably safe place.

6 If you find that the plaintiff's injury was
7 caused solely by his own fault or conduct in continuing
8 to work despite warnings by his superior to sit down due
9 to the heavy weather, then the plaintiff cannot recover
10 against the defendant and your verdict at this point would
11 be brought in for the defendant.

12 Now, there is a conflict of evidence in this
13 area. The plaintiff says he was never warned, he was never
14 told not to work. And the defendant says that through the
15 cook, I guess it was, or steward, one of the two, I guess
16 it is the steward, that he told him to stop. You have heard
17 the contentions of both sides in this area. Recall them;
18 apply them to this particular area.

19 If you find in fact that the warning was given
20 and he failed to heed the warning, then, of course, you
21 charge him with that. On the other hand, if you find that
22 either because of a language difference or because he
23 actually didn't hear it or for some other reason he didn't
24 understand it, then of course he never got any warning in
25 this case. It's as simple as that.

1 elh89

2 The argument was made by both lawyers and I
3 don't see any reason to pursue that particular area any
4 further than that.

5 I might cite as an example of the fact that
6 you must use your own recollection when you come to a
7 determination, my recollection is, and it doesn't bind
8 you in any way, is that the evidence is not only that six
9 men were going to come down to eat, the evidence was
10 that the crew was going to come down to eat but that six
11 of them were on watch and they would have to leave before
12 the others. That is essentially why there were six bowls.

13 If that is not the case, then use your own
14 recollection of it. Because it seems to me that was the
15 case. The way one of the lawyers was talking about it, it
16 looked as if there was only going to be six men coming
17 down to eat that night, and I don't know if that was the
18 fact at that meal. But to use your own judgment about it.

19 In reference to this act of God that was talked
20 about by both lawyers, it is not a valid defense to a suit
21 like this to contend that the injured sailor assumed the
22 risk of his employment if in fact the injury resulted in
23 whole or in part from the unseaworthiness of the vessel.
24 Although a sailor never assumes the risk from any un-
25 seaworthiness of the vessel, it is common knowledge that

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2 in almost every occupation aboard ship there is some
3 inherent and unavoidable risk which does not arise either
4 from negligence or unseaworthiness. Of course, we are
5 not concerned with negligence, but that is a thought.

6 A sailor, when he enters upon his calling, must
7 assume all inherent and unavoidable risks of his occupation,
8 as all persons must; and no person may recover for injuries
9 resulting solely from some inherent and unavoidable risk.
10 Therefore, the employer is not liable merely because
11 a sailor has been injured. The employer, the ship, would
12 be liable if they had failed to provide a safe place to
13 work. If a sailor is injured as a result of the normal
14 hazards or risks of the business in which he is engaged,
15 without the fault on anyone's part, which essentially is
16 not in our case, because unseaworthiness does not require
17 fault, but if it is because of some peril which ordinarily
18 is part of his occupation, then, of course, and the ship
19 is not unseaworthy, then he could not recover against this
20 defendant.

21 If there was a big wave as he described it, and
22 that was the only cause of what happened here, and nothing
23 else, there was no unseaworthy ship, that would not give
24 him a right to recover, because those are the kind of things
25 that happen at sea.

2 I could go on and point up again what these
3 lawyers have said about their contentions as to their
4 positions, but I think they have done it well and they
5 have done it lengthily and we have been over the areas
6 a number of times; so I am not going to go further into
7 what the contentions of the two parties are.

8 I am simply going to indicate to you that at
9 this stage of the case it is your obligation to look into
10 the totality of the evidence that was testified to here
11 in court, and then you make these judgments.

12 The first judgment you must make is this:
13 was the ship unseaworthy? The plaintiff says that it
14 was because he didn't have a safe place to work. The
15 defendant says that it was not unseaworthy because there
16 was nothing wrong with any part of the ship, there wasn't
17 any water there, there wasn't anything that they did or
18 failed to do which in any way created an unseaworthy
19 condition.

20 And then, if you find that there was an unsea-
21 worthy ship, you must determine then if it was the proximate
22 cause of whatever damages he got. You don't know how
23 much he was hurt but you do know that he was hurt and
24 that is sufficient for this purpose.

25 On this aspect of it, as I told you before, the

1 elh92

2 plaintiff has the burden of proving this, and if you
3 are satisfied that the ship was unseaworthy, then you come
4 in with a verdict for the plaintiff.

5 On the other hand, if you find that the ship
6 was not unseaworthy and that the defendant's position is
7 well taken that this was the cause of this wave over which
8 they had no control and the weather through which they
9 had been going there, then you find for the defendant.

10 In the event you find for the plaintiff you still
11 have a further chore to do, because you will recall that
12 I told you that this is under the rule of comparative
13 damages, and therefore when you come to this point if
14 you find that the plaintiff is entitled to recover, you
15 must consider what, if anything, he did which in any way
16 by his own fault contributed to the happening of this in-
17 cident. And if he did in any way contribute to the happening
18 of this incident, then you will tell me what percentage
19 that you think he did.

20 For example, if you feel that it was just as
21 much his fault as the ship's fault, that would be 50 per
22 cent, right? On the other hand, if you think it was 10
23 per cent his fault and 90 per cent of the ship's fault,
24 then, of course, you would report that it was 10 per cent
25 his fault.

1 elh96

2 * * *

at the side bar.

3 (At the side bar.)

4 MR. ZELENKO: Do you think it's possible, maybe
5 we should go inside, Judge. I think the jury can hear us
6 here.

7 THE COURT: I don't think so. They will think
8 we are cooking up something we shouldn't be doing. We
9 will start with Mr. Zelenko, since he is the plaintiff.
b7 10 Any exceptions?

11 MR. ZELENKO: I respectfully except to that
12 portion of your Honor's charge where you stated in words
13 or substance characterizing a question which I asked,
14 like Mr. Zelenko asked that was there anything wrong with
15 the fountain. I think the emphasis on the fact that I asked
16 a question was prejudicial and I except to that, your Honor.

17 Then I respectfully except to that portion of
18 your Honor's charge in which your Honor went into a certain
19 number of statements in which you in effect suggested to
20 the jury that there was something sinister about a company
21 going about getting statements; I think I have copied this
22 right, but this is the portion of it.

23 THE COURT: All right. Your exception is noted.

24 MR. ZELENKO: That you must not assume that they
25 are crooks and that you think a -- you don't think the

1 elh97

2 company could stay in business if they didn't take state-
3 ments down properly. I think this was beyond the -- I
4 say this most respectfully, Judge-- I think this was
5 beyond the ordinarily or proper comment on the evidence
6 and was highly prejudicial.

7 Then of course in regard to Mr. Anduiza, your
8 Honor then made a statement in substance I believe that
9 the fact that he is now a lawyer and he was building a
10 career, that you didn't believe that a jury should feel
11 that he was going to go around and do anything improper.
12 I believe, your Honor, I would suggest to your Honor also
13 that that is beyond the area of fair comment on the evidence,
14 and is highly prejudicial as it doesn't speak of the evidence
15 but just speaks of a characterization of a witness.

16 I also except to that portion of your Honor's
17 charge where your Honor classified the steward and the cook
18 as "coming from the same union hall as the plaintiff and
19 they were colleagues of his." Although there was no evidence
20 of it, there is evidence that they are his superiors and
21 he was bound to accept their orders, which your Honor
22 omitted.

23 In the framework in which your Honor gave that
24 to the jury, I respectfully except as being prejudicial
25 and not proper.

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2 Then your Honor came to a certain portion of
3 the charge in which your Honor stated that when an act
4 or omission played a substantial part in certain causation,
5 then the party would be liable. I don't remember the
6 exact part of the charge, but those are the words you used.
7 I would ask your Honor to charge that when an act or
8 omission played any part, I object to the word substantial
9 part.

10 THE COURT: You didn't offer anything and I looked
11 that up myself.

12 MR. ZELENKO: The Rogers case, your Honor.

13 THE COURT: I looked that up myself and that is
14 the law as I found it.

15 MR. CARR: For the protection of the record, I
16 have recently been involved in a case in the Second Circuit,
17 the name escapes me. But this was the sole issue before
18 the Second Circuit.

19 THE COURT: If the act or omission plays any part,
20 there is responsibility. All right. I will cure that, then.

21 MR. ZELENKO: When the act or omission plays any
22 part in the incident, the defendant is responsible.

23 MR. CARR: In this case we are talking about
24 unseaworthiness, we are not talking about acts or omissions.

25 MR. ZELENKO: The judge did use that expression.

1 elh99

2 MR. CARR: I was going to except to that too.
3 Properly it should be where the condition played any part,
4 however slight.

5 THE COURT: All right. Where the condition
6 plays any part, however slight, in bringing about the
7 accident.

8 MR. CARR: Proximate cause has been established.

9 THE COURT: Proximate cause has been established.
10 Is that the only part?

11 MR. ZELENKO: Yes, your Honor.

12 Your Honor said this morning that you would charge
13 on my supplemental request that a ship owner has an ob-
14 ligation to provide a safe place to work for the plaintiff.
15 Accordingly, he has an obligation to order the work stopped
16 if he sees that the plaintiff is working under unsafe
17 conditions, but your Honor did not charge that.

18 THE COURT: I had it on another slip. I will
19 charge that area. Anything else?

20 MR. ZELENKO: That's all, your Honor.

21 THE COURT: Any exceptions?

22 MR. CARR: This is more of an addition than an
23 exception. We haven't discussed what the plaintiff's ob-
24 ligation was in contributory negligence yet. Remember we
25 were talking about --

1 elh 100

2 THE COURT: If he in any way contributed to
3 the happening of the accident it would diminish his claim.

4 MR. ZELENKO: I think the judge did.

5 MR. CARR: In general terms, yes. But the defendant
6 has a right to assume that he is going to exercise what
7 is reasonable care in carrying on his work and he will
8 avoid conditions that the ordinary use of his faculties
9 would make apparent to him. That if it is his duty to
10 clean the messroom --

11 THE COURT: That part I did forget. I told him
12 I would charge that.

13 MR. ZELENKO: I think your Honor said that he
14 didn't want to go into the facts. That is now going into
15 the facts. That is a contention of the parties.

16 THE COURT: There is a duty.

17 MR. ZELENKO: Our intention was that he didn't
18 have to mop.

19 THE COURT: I know that, but that is a question
20 of fact for the jury to decide.

21 MR. ZELENKO: Then I don't think --

22 THE COURT: There is an obligation on his part
23 to mop if it is needed.

24 MR. ZELENKO: The question is where. He either
25 had to mop the pantry or the messhall.

1 elh 101

2 THE COURT: No, that is an argument you made.

3 MR. ZELENKO: I would respectfully object to
4 any charge on that.

5 THE COURT: When I give it you object to it. But
6 I am going to give a charge in that area.

7 MR. ZELENKO: Then let me object at the side
8 bar.

9 THE COURT: All right, you now object, because
10 I am going to cover it.

11 Where is the other thing about the obvious peril,
12 and so forth?

13 (Pause)

14 THE COURT: Yes, I had agreed to give this and
15 I will give this.

16 MR. ZELENKO: I think your Honor did give it in
17 substance.

18 THE COURT: I did give part of it, but I didn't
19 go as far as the request did, and I indicated I was going
20 to give the request, and you take exception to the court's
21 doing this.

22 MR. ZELENKO: Yes, I did it yesterday. I took
23 exception to any of the charges you had granted.

24 THE COURT: But you are specifically taking
25 exception to me doing this.

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2 MR. ZELENKO: Yes, your Honor.

3 THE COURT: That's in number 7 of the defendant's
4 request.

5 MR. ZELENKO: And I am also taking exception
6 to your Honor charging on the duty to mop unless you would
7 charge that it is a question of fact to which area the
8 plaintiff was required to mop, which was raised as a
9 question of fact.

10 THE COURT: That fact argument has been made to
11 the jury. I see no reason to do that.

12 MR. CARR: Supplemental number 2, your Honor. I
13 understood that both of those would be granted, 1 and 2.

14 THE COURT: This is those cases you cited to me.
15 It's really a regurgitation of 7, and 8 or whatever they
16 are in your brief. But I didn't give any of them, as I
17 recall it. This duty to clean is what they are talking
18 about. I covered this already. I deny that, giving in
19 at this time; that is number 1, and I will give number 2.
20 And you take an exception to that. I told you earlier
21 before we started that I was going to do that.

22 MR. ZELENKO: Well, I take an exception to that.
23 So that I won't have to arise again and talk to you about
24 the question of mopping, because I think I made it clear.

25 THE COURT: Yes, you made it clear. You take an

1 elh 103

2 exception to that and you have an objection to my doing it.

3 MR. ZELENKO: Yes. One further ground, this
4 question of mopping has no basis for the charge on the fact
5 in the case.

6 THE COURT: I think it is, and therefore I deny it.

7 (End of side bar conference.)

8 THE COURT: The lawyers have again been of assistance
9 to the court, and therefore I am going to make a few remarks
10 that I have had called to my attention. You remember I
11 was telling you that if there is unseaworthiness then it
12 must be the proximate cause of the plaintiff's injuries.
13 Whenever I discuss proximate cause I said something about
14 it must be a substantial factor or part of the conduct.
15 Well, that is not an exact exposition of the law.

16 What the correct exposition of the law is, is
17 this: when conduct plays any part, however slight, in
18 bringing about an accident, then that is proximate cause--

19 MR. ZELENKO: Pardon me, your Honor. I think that
20 first word is condition. You said conduct.

21 THE COURT: I stand corrected. Suppose I read
22 it again.

23 Where the condition plays any part, however
24 slight, in bringing about the accident, it is then the
25 proximate cause, because there can be more than one proximate

1 elh104

2 cause. There can be a number. If it is one of them, then
3 a proximate cause requirement is satisfied. Is that
4 satisfactory?

b8 5 MR. ZELENKO: Yes, Judge.

6 THE COURT: Another area. The ship owner is
7 entitled to assume that the seaman, in this case the messman,
8 will see and observe that which would be obvious through
9 the use of his ordinary senses and as was reasonably to
10 be expected under the circumstances. You will consider
11 in your evaluation of the evidence what an ordinary person
12 situated as the plaintiff was, and standing at the work
13 counter would be reasonably expected to see, to hear, and
14 to feel under the circumstances.

15 There is no duty on the part of the ship owner
16 to give the messman notice of obvious dangers if you find
17 that any such obvious danger existed or of a danger which
18 would have been apparent to a reasonably prudent sailor
19 exercising ordinary care under the circumstances shown
20 by the evidence in this case. So you will consider whether
21 the danger of falling during violent movement of the ship
22 was obvious and, if so, no liability exists for that
23 particular item.

24 There is one last thing. In the operation of
25 a ship some water may be found on the deck of the messroom

1 elh 105

2 in heavy weather or during the meal hours. If you find
3 that some water was on the deck of the messroom, its
4 mere existence does not necessarily render the ship un-
5 seaworthy. A seaman is not entitled to a deck that is
6 free from all water. Unseaworthiness exists only when the
7 water creates such a condition of slipperiness that the
8 deck is no longer reasonably fit for the intended use by
9 the crew.

10 There was one last area which concerned the
11 fact that he himself, part of his duties were to mop this
12 area up. And if the incident occurred because of the failure
13 on his part to do something which he was obliged to do
14 under his duties then, of course, it would not be the
15 responsibility of the ship.

16 In this area you know there is a conflict of
17 testimony because the plaintiff claims his job was in the
18 pantry and the other messman was doing the work outside.
19 The ship's steward said that it was the obligation of both
20 messmen to do it and if they saw it during any part of the
21 day when they were working they were supposed to mop it up.
22 There is a conflict of evidence there and it is up to you to
23 make a determination as to that.

24 MR. ZELENKO: Your Honor omitted that last
25 request of mine.

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2 THE COURT Yes. A ship owner has an obligation
3 to provide a safe place to work to the seaman. Accordingly,
4 he has an obligation to order the work stopped if he sees
5 that the plaintiff is working under unsafe conditions.
6 And here you have a conflict of evidence.

7 You remember the plaintiff's version of that,
8 and you remember the defendant's version. So that you will
9 make a determination on that aspect of it also. That is
10 a question of fact for you to determine.

11 All right. You may retire and deliberate.

12 The one juror, madam, your services and when
13 the jury goes in, Mrs. Pagan. Thank you very much for the
14 services to the court. We appreciate your coming. You go
15 down to the jury clerk and he will take care of you from
16 now on. Thank you very much.

17 By the way, you have a lunch, don't you? You
18 have your lunch first, but don't eat it with the others.

19 (The alternate juror was discharged and left
20 the courtroom.)

21 THE COURT: You may retire and deliberate.

22 Can they have the exhibits if they desire to
23 have them? Why doesn't the clerk of the court give it to them.

24 (At 1:07 PM. the jury retired to deliberate.)

25 (At 1:45 P.M. a note was received from the jury.)

U.S. COURT OF APPEALS-SECOND CIRCUIT

Index No.

AH LOU KOA,

Plaintiff-Appellant,

against

Affidavit of Personal Service

AMERICAN EXPORT,

Defendant-Appellee.

STATE OF NEW YORK, COUNTY OF NEW YORK

ss.:

I, James Steele;

being duly sworn,

deposes and says that deponent is not a party to the action, is over 18 years of age and resides at

250 West 146th Street, New York, New York

That on the 2nd day of August 1974 at 1 State St. Plaza, New York

deponent served the annexed

Appellant's Appendix

upon

Haight, Gardner, Poor & Havens-Attorney for Def.-Appellee

the in this action by delivering a true copy thereof to said individual personally. Deponent knew the person so served to be the person mentioned and described in said papers as the Attorney(s) herein,

Sworn to before me, this 2nd

day of August

19 74

James Steele

Print name beneath signature

JAMES STEELE

Robert T. Brin

ROBERT T. BRIN

NOTARY PUBLIC, STATE OF NEW YORK

NO. 31 - 0418950

QUALIFIED IN NEW YORK COUNTY

COMMISSION EXPIRES MARCH 30 1975

